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The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters

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THE EFFECTS OF CASE CONSOLIDATION ON THE PROCEDURAL RIGHTS OF LITIGANTS: WHAT THEY ARE, WHAT THEY MIGHT BE PART II: NON-JURISDICTIONAL MATTERS

Joan Steinman*

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INTRODUCTION

As noted in Part I of this work,¹ the federal courts are consolidating increasing numbers of cases, and many experts are advocating statutory

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1. Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be*, Part I: *Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717 (1995).

enactments designed to further facilitate the consolidation of cases by federal and state courts.² The acceleration in case consolidations and the growing number of litigants whose cases will be consolidated make it increasingly important for courts, lawyers, and litigants to understand the effects of consolidation on the procedural rights of litigants. Part I of this work examined whether consolidation affects or should affect compliance with Article III's requirements for a justiciable case or controversy (standing, mootness, ripeness); alters or should alter application of the requirements for subject matter jurisdiction, personal jurisdiction, and venue; and changes or should change whether plaintiffs have failed to join an indispensable party. It then considered the various respects in which consolidation may alter the timing, scope, and location of and the parties to an appeal.

At the descriptive level, Part I found that consolidation often does alter standing determinations, because many courts permit consolidated cases to go forward so long as any plaintiff from among the consolidated cases has standing to pursue the claims. Consolidation has not altered the analysis or outcome of mootness or ripeness issues, however. By and large, case consolidation also has not altered application of the requirements for subject matter jurisdiction, personal jurisdiction, or venue, and has not changed the analysis determining whether plaintiffs have failed to join an indispensable party. But there are cases that represent exceptions to these general rules: cases in which the courts have bent, or made exceptions to, the general rule that subject matter jurisdiction must be determined by considering each component action independently of the others; in which courts have indicated that consolidation could cure the problems caused by the absence of a party to be joined if feasible; in which courts have held the activities of a party in one component of a consolidation to be relevant to the court's right to assert personal jurisdiction over him in another component; and in which the courts have broadly construed venue statutes to keep a set of consolidated cases together.

Consolidation has had more widespread and obvious effects on the timing, scope, and location of and the parties to an appeal. In most circuits, "all purpose" consolidation of cases results in the surrender of the right to an immediate appeal by the losing parties in any single component. Either as an across-the-board common law rule or as a matter determined case by case, in most circuits such losing litigants have to await the resolution of all claims among all parties to the consolidation before they can appeal, absent a Rule 54(b) certification from the trial judge. In addition,

2. *Id.* at 718-19.

because courts regard the parties to consolidated cases as parties to a civil case within the meaning of the various subparts of Federal Rule of Appellate Procedure 4, consolidation often alters the time a litigant has to file a notice of appeal when all the consolidated cases have been resolved in the trial court. Litigants may benefit from an extension of time that otherwise would be unavailable to them, but they have suffered from their notices of appeal being rendered premature and ineffective.³ Under the statutes that govern the Court of Appeals for the Federal Circuit, litigants may even find that consolidation has altered which court of appeals has jurisdiction over their case.

At a normative level, Part I of this work argued that a procedural system that is fair, generates more accurate expectations, and is more efficient, would result from a shift in the paradigm from the long parroted view that consolidations do not merge lawsuits, change the rights of the parties, or make the parties in one suit parties in another. It concluded that when a court considers consolidating cases, it should take the view that consolidating cases for all purposes or for trial will create a single civil action, change the rights of the parties, and make them parties to an action that encompasses all components of the consolidation. If that is not what the court wants to do, then it should take lesser steps: order only multicase briefing or discovery, or limited scope joint pretrial hearings, as appropriate. Creating an all-encompassing civil action would be constitutional under Article III when each of the consolidated cases is jurisdictionally self-sufficient or when any claims that are not so self-sufficient arise out of a common nucleus of operative fact with claims that are.⁴ An all-encompassing civil action also would be compatible with the statutes that confer jurisdiction over specified "civil actions" and would be consistent with the federal rules of civil and appellate procedure, or could be made consistent with minimal amendments to those rules.⁵ This approach would enable federal courts to hear additional claims that can efficiently be heard together, without compelling them to do so. It would facilitate the federal courts' adjudication of transactionally related claims by enabling the federal courts

3. The amendments to Federal Rule of Appellate Procedure 4(a)(4), effective in 1993, cure the latter problem by rendering premature notices of appeal effective on the date of entry of the order disposing of the last motion extending the time for filing. *See id.* at 826.

4. If claims that are not jurisdictionally self-supporting are tied to consolidated claims that are jurisdictionally self-supporting by common questions of law or common questions of fact not amounting to a common nucleus, the totality still could constitutionally be regarded as a single Article III case or controversy if the interpretation of supplemental jurisdiction within Article III was liberalized so that such lesser linkages suffice. *See id.* at 743-48.

5. *See id.* at 731-40.

to assert supplemental jurisdiction and personal jurisdiction in situations where they otherwise might not be able to do so. It also would eliminate uncertainties concerning litigants' rights and obligations with respect to appeals that currently result in inadvertent waivers of rights and in the expenditure of trial and appellate resources now devoted to resolving those uncertainties.⁶

Part II of the Article moves beyond the effects of consolidation on matters of justiciability and jurisdiction, to several other contexts in which consolidation does or might affect the procedural rights of litigants. It proceeds more or less chronologically through the course of a lawsuit, looking both at rights based in the Federal Rules of Civil Procedure and at procedural rights grounded elsewhere. It explores effects on the posture and framing of claims, the attorney-client relationship, the availability of particular discovery devices and other aspects of discovery, the right to voluntarily dismiss a suit, choice of law, the scope of a jury demand and the range of issues on which courts will, in their discretion, allow determination by a jury, the circumstances under which judges should recuse themselves, the number of peremptory challenges to which litigants are entitled, "law of the case" and preclusion doctrines, and the award of costs and attorneys' fees. While not necessarily exhaustive, this survey conveys the range and significance of the procedural rights that consolidation may alter.

One of my goals is to alert lawyers, judges, and law reformers to the ways in which consolidation affects procedural rights. Those who utilize, constitute, and determine the shape of our procedural system can better do their respective jobs if they are better informed. My second goal is to continue to explore what effects consolidation ought to have on the procedural rights of litigants. Part II tests whether the hypothesis of Part I, that a better procedural system would result from a shift in the paradigm (from that in which each component of a consolidation retains a separate identity to one in which consolidating cases for all purposes or for trial would create a single, all-encompassing civil action), holds up across the board with respect to nonjurisdictional matters.

I. STARTING POINTS

In the early 1930s, in the context of distinguishing direct from collateral attacks on judgments, the Supreme Court declared that "consolidation . . . does not merge the suits into a single cause, or change the rights of

6. See *id.* at 794-809, 814-32.

the parties, or make those who are parties in one suit parties in another.”⁷ This pronouncement has influenced courts’ decisions in a multitude of contexts, although it has not always controlled case outcomes. This view of consolidation has some virtues, including its clear constitutionality, its apparent clarity, and the degree of autonomy that it affords to litigants to determine the contours of their lawsuit. But it also has some drawbacks and imposes some limitations on the courts. It lessens the courts’ ability to modify litigants’ decisions defining the boundaries of lawsuits, to create the most efficient litigation units, and to manage litigation most productively and fairly. Its advantages and drawbacks for litigants will be illuminated as this Article considers the various contexts in which it matters how one defines the contours of a lawsuit and the parties to it.

In Part I of this work I suggested that we consider whether the statutes and rules that govern federal court procedure permit a concept of consolidation that *would* merge suits into a single cause and, when the statutes and rules permit such a view, that we assess whether a procedural system that starts from this different conception would work better than the current system.⁸ In making the series of inquiries that follows, I posit consolidations for all purposes or at least for purposes of trial because, where cases have been consolidated for trial, courts typically would have acted appropriately in consolidating them for all purposes. For reasons elaborated in Part I, I do not suggest that when consolidation is limited to particular issues or to particular earlier phases of a lawsuit, such as discovery, the cases involved should be treated as a single civil action.⁹

II. RULE BASED ISSUES—A SAMPLER

A number of the Federal Rules of Civil Procedure speak of “parties,” bestowing rights and imposing burdens on the parties to a civil action. Each time they do so, a potential issue lurks as to whether the parties to

7. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933).

8. Part I of this Article analyzed whether, and under what circumstances, viewing a consolidation as a single civil action would be constitutional, consistent with federal jurisdictional statutes, and consistent with Rule 42 and various others of the Federal Rules of Civil Procedure, particularly those governing the joinder of parties and claims. This Part will not reiterate that analysis. Since Part I concluded that viewing consolidations as single civil actions would be consistent with the Constitution, and with the aforementioned statutes and Rules, where the cases arose from a common nucleus of operative fact, I will assume the accuracy of that conclusion for purposes of this Part. When this Part raises the question whether a consolidation may be treated as a single civil action in the context of statutes that were not discussed in Part I, it will address the question head on.

9. See Steinman, *supra* note 1, at 787–91.

one component of a case consolidation should be regarded as parties to another component or to the larger whole composed of all the components.

A. The Posture and Framing of Claims

Part I of this work discussed how courts should treat parties to a consolidation for purposes of the rules requiring or permitting the filing of counterclaims and cross-claims, and for purposes of the rules, like Rules 13(h), 14, 19, and 24,¹⁰ requiring or permitting the addition of outsiders. My argument was that the Rules, the jurisdictional statutes, Supreme Court precedent, and Article III permit the product of a consolidation to constitute a single civil action within the meaning of the Rules and jurisdictional statutes. Consequently, the courts could consolidate first and then consider whether particular claims could be asserted and whether they would be original claims, counterclaims, cross-claims, third-party claims, or the like. If courts were to regard consolidation as creating a single civil action to which all of the parties in any of the components also are party, Rules 13(h), 14, 19, and 24 would be inapplicable to persons party to any of the components because those Rules authorize claims only against persons who are not already parties. As a result, parties "from" different components would be able to assert claims against one another only if the various plaintiffs (or defendants) were regarded as co-parties eligible to assert cross-claims, the various defendants were regarded as adverse to the various plaintiffs (even those who had asserted no claims against them) so as to be eligible to assert counterclaims, or the various parties were regarded as non-adverse parties who could assert claims against one another, as a third-party defendant can assert a claim against a plaintiff. Since parties are likely to have claims against one another only if the parties were involved in the same transaction, occurrence, or series of transactions and occurrences—so that (under the Rules) they could have sued or been sued together, or sued one another—it should not be disquieting to regard as cross-claims, counterclaims, or third-party claims any claims that they seek to assert against one another.

Regarding consolidation as creating a single civil action has the further advantage of enabling courts to invoke supplemental jurisdiction to hear claims that they otherwise might be unable to hear for lack of complete diversity or of a federal question. However, to view defendants as adverse to plaintiffs who have asserted no claims against them could make certain

10. FED. R. CIV. P. 13(h), 14, 19, 24.

claims compulsory counterclaims, which otherwise would not be. In the interest of avoiding unfair surprise, I urged the courts *not* to treat as compulsory a claim that a defendant from one component action has against a plaintiff from another component action, *unless* and until Rule 13(a) is amended to make clear that such claims are compulsory when they derive from the same transaction or occurrence that binds the consolidation together through the common questions that it generates. I urged the drafters to so amend Rule 13(a). I took the further position that persons already parties should not have to be served with a summons as well as a pleading when a party from a different antecedent case asserts a claim against them.¹¹ I adhere to those arguments. In what follows, the Article discusses other contexts under the Rules in which similar issues are likely to arise. First, I want to speak to other effects of consolidation on pleadings and on the conduct of litigation generally.

1. The Effects of Consolidation and Lead Counsel on Consolidated Pleadings and, More Importantly, on the Attorney-Client Relationship in Consolidated Cases

Early on, the federal courts would neither order nor permit the filing of consolidated pleadings.¹² Often citing *Johnson v. Manhattan Railway Co.*,¹³ they believed that such pleadings would violate *Johnson's* strictures against merging suits and making parties in one suit parties to another. By the mid-1970s, the courts had changed their minds; they had recognized the advantages of consolidated complaints and made them permissible, at

11. Steinman, *supra* note 1, at 778–79.

12. See, e.g., *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958). In the first federal appellate case to recognize judicial power to order consolidation for pretrial and to appoint “general counsel,” the court nonetheless held that district courts have no authority to order a consolidated complaint. See *Wilbur v. Superior Concrete Accessories*, 217 F. Supp. 600, 602 (N.D. Cal. 1963) (holding that plaintiffs’ proposed combined complaint was inappropriate and might result in needless confusion); *Journapak Corp. v. Bair*, 27 F.R.D. 509, 511 (S.D.N.Y. 1961) (expressing doubt that the court had the power to order a consolidated complaint); *National Nut Co. v. Susu Nut Co.*, 61 F. Supp. 86, 88–89 (N.D. Ill. 1945). In *National Nut*, the court denied a motion that the complaint in one consolidated component stood as an amended and supplemental complaint in the other component, on the grounds that such a reading would work a merger of the cases, superseding one of them, would prejudice the rights of the defendants (in ways not specified), would complicate the question of costs, and would be impermissible because the defendants in one case could not be made defendants in the other. The court ordered, however, that the cases could be tried together, that the evidence in one would be considered evidence in both, that common questions of law could be decided in one decision, and that only one decree would be entered.

13. 289 U.S. 479 (1933); see *supra* text accompanying note 7; *infra* text accompanying notes 208–215.

least for pretrial purposes.¹⁴ What once was at best controversial had become widely accepted. While the filing of consolidated pleadings may be reconciled with the persistence of separate actions, the courts that initially balked were correct to perceive that consolidated pleadings are even more consistent with, and promote, treating a "consolidation" (particularly a consolidation for all purposes or for trial) as a single civil action.

The filing of consolidated pleadings, like the filing of any amended pleadings, may have implications for the merits of motions to dismiss, the disposition of motions to certify a class,¹⁵ the time by which parties must file a jury demand, and settlement prospects.¹⁶ These are indirect consequences of consolidation, most of which this Article does not explore in detail.¹⁷ Amended, particularly consolidated, pleadings also may alter the claims that parties assert and the parties against whom they assert claims.

14. See, e.g., *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358-59 (2d Cir. 1975) (allowing the consolidated complaint to govern pretrial in order to prevent a proliferation of duplicative filings and to reduce confusion; relying on the district court's assurances that the consolidated complaint need not foreclose the use of individual complaints at trial, in concluding that the consolidated complaint did not supersede the individual complaints or impermissibly merge the parties' rights or defenses); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 262, 264-65 (D. Minn. 1989). In *Wirebound Boxes*, the court upheld the filing of a consolidated complaint by lead counsel in multidistrict litigation over the objection, *inter alia*, that the court could not authorize such without the consent of all plaintiffs. The court also held that a consolidated complaint does not impermissibly merge the parties' rights and defenses. It reassured the parties that the consolidated complaint would govern for pretrial purposes but would not supersede the individual complaints and that the court would "undertake appropriate measures to preserve for trial and judgment, if proper, the individual identities of these actions." *Id.* at 264. The court dismissed as moot the Rule 12 motions pending in the individual actions, effectively holding defendants who had failed to direct Rule 12 motions to the consolidated complaint to have waived certain Rule 12 defenses. *In re Storage Technology Corp. Sec. Litig.*, 630 F. Supp. 1072, 1074 (D. Colo. 1986) (mentioning an order for filing of a consolidated class action complaint to supersede all existing complaints in the actions consolidated); *In re AM Int'l, Inc. Sec. Litig.*, 108 F.R.D. 190, 198 n.11 (S.D.N.Y. 1985) (approving the consolidation of complaints into one action to be pursued as a class action); *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 175-76 (C.D. Cal. 1976) (holding the consolidation of pleadings for pretrial to be within a court's discretion, particularly in multidistrict litigation, and citing the economies gained). See generally Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 598-603 (1991) (describing factors courts should consider in deciding whether to order or allow consolidated pleadings; noting, in passing, the paucity of experience with resurrection of the separate identities of cases after pleadings were consolidated); Steinman, *supra* note 1, at 786-87 (regarding consolidated pleadings). MANUAL FOR COMPLEX LITIGATION § 40.1(7) (2d ed. 1985) also contemplates the filing of consolidated pleadings.

15. See Murphy, *supra* note 14, at 599, 601. After a consolidated complaint has been filed, the court also has to decide such matters as whether to require all motions to be filed anew, and the effect of the consolidated complaint on the resolution of pending and later filed motions. *Id.* at 604.

16. *Id.* at 603 (speculating that consolidation of pleadings may empower lead counsel and provide a focus for negotiation, so as to facilitate settlement).

17. But see *infra* text accompanying notes 97-120 (regarding jury demands).

Especially in large consolidations, counsel may make these amendments without the consent and even over the objection of individual claimants.¹⁸ If something is new here, it is not that amended pleadings can make such changes, but the odds that decisions to so amend will be beyond the control of the claimants. This change is largely a function of the consolidation of large numbers of claims and of the typically concomitant appointment of lead counsel and executive or steering committees, whom the courts afford considerable freedom to act without regard to the wishes and directions of individual claimants whom counsel have been appointed to represent.¹⁹

The forces that isolate parties from the lawyers handling their claims, which may first be manifest in connection with pleadings, continue to operate throughout the litigation. These indirect effects of consolidation change, if not the procedural rights of litigants, at least the realities of the litigation process for them.

To the extent that consolidation carries in its wake the appointment of lead and liaison counsel who, as a practical matter, oust the attorneys chosen by parties, consolidation also alters the procedural "right" of civil litigants to select their own counsel. This right is a qualified right of amorphous content and contours. It has origins in England and is explicitly recognized in a number of state constitutions,²⁰ but its dimensions never

18. See, e.g., *Katz*, 521 F.2d at 1361-62 (district court deemed the answer of each defendant to assert cross-claims in the nature of contribution and indemnification against all other defendants, and peripheral defendants feared that the order requiring a consolidated complaint would result in a much expanded group of plaintiffs asserting complaints against them; the appellate court held that the former matter had not been appealed and that defendants' latter concerns about prejudice were premature and speculative); *Wirebound Boxes*, 128 F.R.D. at 264-65 (upholding the consolidated complaint which alleged a broader plaintiff class and named more defendants than had individual complaints, over some plaintiffs' objection); *Equity Funding*, 416 F. Supp. at 177 (allowing consolidated complaint that added new claims and joined new parties); *Waldman v. Electrospace Corp.*, 68 F.R.D. 281, 284 n.4 (S.D.N.Y. 1975) (noting that plaintiffs may be more likely to amend complaints to add defendants if cases are consolidated, but that such amendments may be made with or without consolidation). But see *Storage Technology*, 630 F. Supp. at 1074 (allowing objecting parties to opt out of consolidated complaint).

19. See, e.g., *Wirebound Boxes*, 128 F.R.D. at 264-65. See generally, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494 (1994) (in mass tort cases, many lawyers do not maintain meaningful one-to-one contact with their clients, nor represent them as individuals; at best, bureaucracies maintain phone contact; at worst, the lawyers neglect their clients).

20. See generally *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1325 (1966) ("The right to retain counsel in civil proceedings emerged in recognition of the need for legal assistance. . . . The right to retain counsel in civil causes reflected the evolution of a concept of 'due process' in English law."); *id.* at 1327 (noting further that the existence of a right to retain counsel in civil litigation has been generally assumed in the American legal system). See also *id.* at 1327 n.36, citing, *inter alia*, MICH. CONST. art. I, § 13 ("A suitor in any court of this

have been made clear.²¹ When parties in consolidated cases have challenged the appointment of lead counsel and concomitant limitations upon the participation of the attorneys whom the parties had chosen to represent them, the courts sometimes have uttered reassurances about the ability of nonlead counsel to participate, but increasingly they have acknowledged the substantial disenfranchisement of nonlead counsel. In either event, the courts have upheld the lead counsel system as emanating from the courts' Rule 42(a) managerial powers and from their inherent power to control the disposition of causes before them.²²

state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."); MISS. CONST. art. 3, § 25 ("No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both."); N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . ."); N.Y. CONST. of 1777, § 34 (criminal defendants "shall be allowed counsel, as in civil actions").

21. Ordinarily, as a practical and legal matter, one can retain counsel of one's choice subject to certain limitations: one must be able and willing to pay what the attorney demands, the attorney is free to decline the representation, and conflict of interest rules must not prohibit the representation. The lead/liaison counsel system, however, supersedes legal and ethical arrangements agreed to by willing lawyers and willing clients. While the scope of the qualified right to counsel of one's choice is quite unclear, the right to counsel in civil cases, even the right to counsel of one's choice, has received some recognition by courts, including the U.S. Supreme Court. See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333 (1985) (although the Court held that the statutory \$10 limit on the fee that may be paid an attorney who represents a veteran seeking benefits from the Veterans Administration for service-connected death or disability is constitutional, a factor in that decision was that the decision-making process was not designed to operate adversarially); *id.* at 366 (Stevens, J., dissenting) ("[T]he availability of . . . competent, free representation is not a reason for denying a claimant the right to employ counsel of his own choice . . ."); *id.* at 368-72 (the Due Process Clause and the First Amendment protect the right of an individual to consult an attorney of his choice in connection with a controversy with the government); *id.* at 371 ("[T]he citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy."); *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (speaking of the Court's zeal in protecting the rights of confrontation and cross-examination, in civil as well as in criminal cases; noting that the right to be heard often would be of little avail if it did not encompass the right to be heard by counsel; and holding, *inter alia*, that procedures for terminating public assistance payments to welfare recipients were constitutionally inadequate in failing to permit recipients to appear personally with counsel before officials who finally determined continued eligibility).

22. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 297 (6th Cir. 1988), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 488 U.S. 1006 (1989) (stating that it is well recognized that district judges may create a plaintiffs' lead counsel committee, and rejecting the argument that doing so denied plaintiffs' right freely to choose counsel, where no plaintiff responded to the court's order to show cause why such an appointment should not be confirmed); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-75 (9th Cir. 1977) (upholding the power of district court to appoint a committee of lead counsel and to restrict the activities of nonlead counsel); *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977) (affirming the court's authority to appoint lead counsel, to conduct pretrial, and prosecute issues of liability on behalf of all plaintiffs); *Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2d Cir. 1971) (holding that orders requiring, *inter alia*, that all pleadings and notices be served by

Courts have not seemed greatly concerned that by appointing lead counsel they overturn litigants' choice of counsel and transform the attorney client relationship in potentially deleterious ways.²³ The courts' apparent lack of concern and their rather cavalier treatment of the arguments against such involuntary substitution of lead counsel for counsel chosen by the various parties are, I think, a function of two things: the courts' belief in the practical necessity to channel all plaintiffs' and all defendants' arguments through a single spokesperson for each side (except on those occasions when the court explicitly permits the expression of divergent viewpoints or unique interests); and their sense that such channeling, and the substitution of lead counsel for party-selected counsel generally, are unlikely to lead to less accurate or less just results. It may well be that systemic interests do outweigh both the reasons to respect a party's choice of counsel and the interests served by more individual representation.²⁴ Courts

lead counsel and refusing to entertain nonlead counsel's motion for summary judgment did not deny the nonlead attorney an appropriate opportunity to participate in the litigation; such attorney could file the motion with leave of court); *MacAlister v. Guterman*, 263 F.2d 65, 68-69 (2d Cir. 1958) (relying on Rule 42 and inherent power to hold that district judges have the power to appoint "general counsel" in consolidated litigation to channel the efforts of counsel and avoid duplication, waste, and inefficiency; noting that "[t]he advantages of this procedure should not be denied litigants . . . because of misapplied notions concerning interference with a party's right to his own counsel"); *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 737 F. Supp. 396, 397-98 & nn.3 & 6 (E.D. Mich. 1989) (upholding the authority to appoint lead counsel over objections that the court lacked authority to do so and that such designation abridged plaintiff's right to representation by counsel of her choice). In *Air Crash Disaster*, the court stated that plaintiff's attorney could fully represent her so long as his activities were not inconsistent with the terms and spirit of the court's order and that non-members of the steering committee could offer assistance and suggestions to lead counsel, but it noted that the trial would become chaotic and totally unmanageable if the court permitted the counsel for each plaintiff to present his position or theory of the case to the jury. See also *Wirebound Boxes*, 128 F.R.D. at 264-65. In that case, plaintiffs in actions consolidated for pretrial sought sanctions for lead counsel's filing of a consolidated complaint which included them, over their prior explicit objection. The court responded that "[lead counsel] did not act improperly in filing the consolidated complaint against their wishes. As plaintiffs' lead counsel, Opperman may act on behalf of all plaintiffs as the court allows." The court added, without explanation, that "the individual plaintiffs remain free to present divergent positions." See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 14, § 20.221-.222. The constriction or impairment of this right is not limited to consolidations, of course. It is the rule in class actions as well, where the court is obliged to appoint counsel who will fairly and adequately represent class members. See *FED. R. CIV. P.* 23(a).

23. Increasing the number of parties whose interests the attorney should consider, for example, weakens the influence of any particular litigant on objectives and strategies, and deters consultation.

24. Cf. Owen M. Fiss, *The Allure of Individualism*, 78 *IOWA L. REV.* 965, 978-79 (1993): Where particular individuals have been singled out . . . the value of individual participation ranks very high, maybe even supreme. In those situations, participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual, as well as a more instrumental value, ensuring that courts are presented with the

should recognize that the lead/liaison counsel system does entail costs, however, and should weigh these costs when deciding whether to consolidate cases and appoint such counsel.

I also would urge that, to help counter some of the adverse indirect effects of large scale consolidations, the procedural rights of litigants *should change*. Although consolidated litigation is theoretically not representative litigation,²⁵ in practice it often is; parties' fortunes are collectively placed in the hands of a lead counsel who has been appointed by the court or selected by other attorneys, acting at the court's direction. Consequently, the rules should afford parties to consolidated cases protections as least as rigorous as those afforded to class members by Federal Rule of Civil Procedure 23.²⁶ For example, if the parties are sufficiently numerous that lead counsel or a steering committee will substantially control the conduct of the litigation, the court should do its best to assure that the selected counsel will fairly and adequately protect the interests of the consolidated co-parties, and the court should be required to approve dismissal or compromise of the component actions, including any provision for attorneys' fees.

Many of the troubling indirect effects of consolidation that need to be addressed arise from aggregating large numbers of claims; they do not depend upon whether the aggregation is affected by joinder, consolidation, or

facts and issues in the sharpest possible terms. But in structural litigation . . . the value of participation, understood in its individualist form, loses some of its force. . . . Due process . . . does not give absolute control to each and every individual; it does not require a disregard for the social consequences of a procedural rule [It sometimes] may be necessary to forgo the right of participation and to leave various individuals with no other assurance than that their interests will be adequately represented. But this adjustment . . . rests on the most appealing of all premises—that doing so will more fully remedy the violation of the rights of others This is . . . to acknowledge that the fairness of procedures in part turns on the social ends that they serve.

25. Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 499 (1991).

26. See Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 256-57 (1991) (considering whether and when due process might require a right to opt-out of consolidations); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1042 (1993) (commenting on the absence from consolidated litigation of the many devices that protect absent members of Federal Rule of Civil Procedure 23 classes); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 621 (1992) (asking whether, to afford due process, courts should treat the representation in large scale consolidations as they treat representation in class actions); Weinstein, *supra* note 19, at 529. Currently, many protections afforded class members are not afforded to parties to consolidated cases. In addition to the matters discussed in the text, class members obtain some protection from the requirements of class definition, numerosity of claimants, typicality of claims, and the requirements in Federal Rule of Civil Procedure 23(b), including the right to opt out of (b)(3) classes. Lacking these defenses against a deprivation of rights without due process of law, other mechanisms should be established to assure fair proceedings to parties to consolidated actions.

class certification. To some extent, the problems flow from inadequate ethical guidelines, from the impracticability of fulfilling ethical obligations predicated upon one-lawyer, one-client relationships, from insufficient incentives for lawyers to live up to those of their fiduciary obligations that they might fulfill, and from inadequate supervision by the courts.²⁷ So far as I can tell, none of the troubling indirect effects has been or would be exacerbated by treating a consolidation for all purposes, or for trial, as a single civil action.

B. Discovery

Treating a consolidation as a single civil action would facilitate discovery among parties to different components by allowing them to use the full arsenal of discovery devices against one another and by obviating the need for subpoenas in connection with inter-party discovery. To so regard consolidations would provide a theoretical platform for what courts and litigants already usually do, and would bring into line the courts that are surprising litigants, to their detriment, when those courts fail to regard discovery from one component as discovery in an entire consolidation. As the discussion below also illustrates, treating a consolidation as a single civil action would conserve appellate resources when persons who are parties to some, but fewer than all, of the consolidated cases appeal discovery rulings.

Some discovery devices and sanctions are available only against parties. Interrogatories, Rule 34 requests to produce documents and things and to enter upon property, physical and mental examinations, and Rule 36 requests for admissions all may be served upon and demanded only of

27. See Michael D. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817, 829 (1988) (observing that lack of guidance in the ethical framework provides class attorneys with almost unfettered control); Weinstein, *supra* note 19, at 493-94 (observing that a lack of communication undermines the lawyer's duty of loyalty to the client and the obligation to abide by the client's decisions concerning the objectives of the representation); *id.* at 499 (that those in charge of national litigation have a responsibility to keep local counsel apprised); *id.* at 503-04 (that the present ethical rules do not sufficiently police conflicts between lawyer and client in the mass client context, *inter alia*, because the clients cannot effectively control the lawyer's conduct of the litigation); *id.* at 521-23 (nor do present ethical rules adequately guide the distribution of aggregate settlements); *id.* at 532-33 (asking how ethical duties constrain attorneys' jockeying for power and rewards in mass cases); *id.* at 534 ("[P]roblems of effective representation, zealous advocacy, communication, fees, financing, confidentiality, and conflicts of interest do not lend themselves to easy solutions. The traditional ethical rules . . . are inadequate due to their reliance on the single-litigant, single-lawyer model.").

parties.²⁸ Similarly, some sanctions may be imposed only on parties.²⁹ Given these rules, whether a person is a party to particular litigation determines whether he is obligated to respond to discovery requests made through these party-limited discovery devices, at whose behest he is obligated to respond, and the circumstances under which he is subject to the sanctions reserved for noncompliant parties.

If Congress (itself or through those to whom it has delegated the authority to promulgate the Federal Rules of Civil Procedure) chose not to authorize case consolidation that would merge lawsuits into a single civil action, the courts could not properly regard the product of consolidation to constitute a single civil action, even if Congress constitutionally could have made a different choice. However, Part I of this work established that nothing in the Federal Rules of Civil Procedure, federal statutes or Supreme Court interpretation thereof, and nothing in Article III, precludes a consolidation of lawsuits from creating or constituting a single civil action.³⁰ Moreover, there are persuasive reasons why a consolidation should constitute a single civil action.³¹ If, as proposed in Part I, a consolidation for all purposes or for trial is treated as creating a single civil action, party A "from" antecedent Suit One and party C "from" antecedent Suit Two, along with the other parties from Suits One and Two, would be obliged by Rule 26(f) to meet to discuss the nature and bases of their claims and de-

28. See FED. R. CIV. P. 33-36. Technically, the court may order a party to produce him or herself or a person in the custody or under the legal control of the party, and whose mental or physical condition is in controversy, for an examination. FED. R. CIV. P. 35(a).

29. See FED. R. CIV. P. 37(b)(2),(c),(d),(g).

30. See Steinman, *supra* note 1, at 732-46. Perhaps the most important observation made there, concerning Article III, is that:

[w]hen factually and legally independent claims have been presented to a federal court within the confines of a single action and each has been supported by an independent basis of subject matter jurisdiction, the Court never has indicated that the bounds of a constitutional case were exceeded. . . . In view of this history, so long as a federal court has jurisdiction to hear claims in and of themselves, those claims may be constituents of a single 'case' notwithstanding the absence of a common nucleus of operative fact among them. The absence of such a nucleus among consolidated claims therefore would not seem to disqualify them from constituting a single constitutional 'case.'

Id. at 744-45.

I consequently proposed that:

a . . . "case" include[] (1) all claims that are jurisdictionally self-supporting, which the Rules now allow the parties to assert together or which the Rules reasonably might allow the parties to assert together, consistently with federal jurisdictional policies, plus (2) all claims within the courts' supplemental jurisdiction, as defined by the cases concerning pendent, ancillary, and pendent party jurisdiction and by any future cases further refining the requirements.

Id. at 745.

31. See Steinman, *supra* note 1, at 736-38.

fenses and the possibilities for a prompt settlement of the case, to arrange for prediscovery disclosures, and to develop a proposed discovery plan.³² There is, in fact, precedent for all the parties to consolidated litigation to meet pursuant to Rule 26(f) and attempt to negotiate a discovery plan.³³ In addition, party C would be obliged to respond to interrogatories propounded by party A, and would be subject to sanctions under Rule 37(d) for failure to serve answers or objections, after proper service of those interrogatories. Party C could properly request the court to order a physical or mental exam of party A, and the court could properly enter the order if A's physical or mental condition were in controversy and C showed good cause for the examination. Party A could make a Rule 34 request for production of documents or a Rule 36 request for admissions of party C.

These results are desirable as a matter of policy. It makes sense for parties who will take discovery of one another and have their claims tried together to have to meet to plan the ensuing pretrial preparation. The rules allow interrogatories to be propounded only to parties (at least in part) because answering them is so onerous that it is inappropriate to impose the burden on any one who does not have a stake in the litigation.³⁴ Parties

32. FED. R. CIV. P. 26(f).

33. See, e.g., *Bank Brussels Lambert v. Chase Manhattan Bank*, No. 93 Civ. 5298, 1994 U.S. Dist. LEXIS 11080 (S.D.N.Y. Aug. 9, 1994). Where actions had been consolidated for discovery, parties to the consolidated cases attempted to negotiate a Rule 26(f) plan; the court ordered a modified plan and ordered that, unless otherwise agreed in writing, counsel on the list annexed to the order (which presumably listed counsel for all the parties) were to be served with all discovery requests, responses, and related correspondence in the consolidated cases. It also may be noteworthy that, in ordering certain discovery cycles for party depositions and another cycle for third-party depositions, the court drew no distinctions between the cases, although certain individuals who would have been "third parties" as to one consolidated action were parties to the other. This may suggest that the court intended "third parties" to include only persons who were parties to neither of the components. If so, it treated the consolidation as a single civil action, for that purpose. *Id.*

34. Compare the concerns expressed in *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972), concerning any requirement that Federal Rule of Civil Procedure 23 absent class members respond to interrogatories (citing the time and perhaps legal counsel required to answer interrogatories as reasons to hold that interrogatories could not be propounded to absent class members). See generally Steven W. Berman & Daniel J. Berger, *Answering Defendant's Interrogatories*, in *ACCOUNTANT LIABILITY* 1989 (PLI Corp. Law & Practice Course Handbook Series No. B4-6886, 1989) (noting that answering interrogatories is a time consuming task; interrogatories are usually detailed; class members do not understand how to respond and lack any ongoing involvement or understanding of the litigation, thus may not respond); Robert S. Jones, *Federal Civil Procedure—Discovery Available Against Absent Plaintiffs to a Class Action*, 21 J. PUB. L. 189, 193, 196, 200 (1972) (noting the burden of answering interrogatories and concern that small claimants will not enter an action if they have to file lengthy forms because the potential gain may not be proportionate to the inconvenience of answering). Although courts may have transferred parties in consolidated cases to a forum they did not choose, changed the contours of their litigation, and for most purposes substituted lead counsel for the counsel of the parties' choice, I

A and C (that is, parties from different components of a consolidation) presumably would seek discovery from one another when, and because, their claims and defenses arise out of the same transaction, occurrence, or series of transactions or occurrences. For reasons described in Part I of this work, absent that relationship it is unlikely that Suits One and Two would have been consolidated for all purposes or for trial.³⁵ Thus, it is highly probable that A and C have a stake in the litigation that justifies imposing on each of them the burden of responding to interrogatories propounded by the other. If, in a particular situation, they did not have such a stake, the party imposed upon could seek a protective order from the court, excusing him from responding to the interrogatories (or providing a lesser degree of protection), so that he could be spared "annoyance, embarrassment, oppression, or undue burden or expense."³⁶ Similar reasoning supports imposing on litigants from different components of a consolidation the obligation to respond to requests for production of documents or other tangible things, and holding them subject to orders for physical and mental exams, when such orders are otherwise appropriate. Certainly, to permit such discovery is more efficient than to require repetitive efforts to elicit the same information, some through devices available only against parties and others through devices available against any person.³⁷ Moreover, because the litigants already are subject to the personal jurisdiction of the court, the

do not believe that the parties' inability to control these facets of the litigation provides reasons to excuse them from "party" discovery. Litigants outside the consolidation context also are subject to involuntary transfer and to the additions and subtractions of parties and, when multiple parties join or are joined, may be required to alter their expectations as to who will represent them. So far as I know, no one has suggested that they consequently should be treated as something other than full fledged parties for purposes of the discovery rules.

35. See Steinman, *supra* note 1, at 777, 787-89. The claims and defenses would have to share at least a common question of fact, to which the discovery relates, for the discovery request to seek relevant information.

36. FED. R. CIV. P. 26(c).

37. Cf. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994). In that case, the court noted:

[W]here a third party wishes to modify a protective order so as to avoid duplicative discovery in collateral litigation, policy considerations favoring the efficient resolution of disputes justify modification unless such an order would tangibly prejudice substantial rights of the party opposing modification. . . . Even if such prejudice is demonstrated, the court has broad discretion in determining whether the injury outweighs the benefits of modification.

Id. at 896.

court should not need to issue subpoenas under Rule 45,³⁸ in order to command the production of documents or other tangible materials sought by a party to a different component of the consolidation.

Rule 36 admissions by their nature are appropriate only for parties, since their sole effect is to conclusively establish the matters admitted. Although Rule 36(b) provides that “[a]ny admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding,”³⁹ where actions have been consolidated for all purposes, and typically are to be tried together, it makes good sense for “the pending action” of which Rule 36 speaks to encompass the entire consolidation, rather than for the several components to be regarded as “other proceeding[s].” It would be inefficient and confusing to the trier of fact for a matter admitted in one component to have to be proven in another component and, so long as litigants understand that consolidation creates a single civil action, the party making the admission could not claim unfair surprise upon learning that his admission is binding for purposes that pervade the consolidation.

Case law on these matters is exceedingly sparse. Two explanations occur to me for the paucity of decisions concerning such effects of consolidation on the discovery rights and obligations of parties. One is that litigants may have finessed the problem by having a party to the same antecedent component as the recipient of a discovery request be the requesting party, who then shares the fruits of the request with all others in the consolidated cases who share a common interest.⁴⁰ Another and perhaps more likely explanation is that, as a practical matter, adversarial litigants already regard all the parties to a consolidation as parties to a single civil action. Consequently, litigants do not oppose discovery requests by raising the kind of objections or issues I suggested above and thus do not provoke published judicial decisions resolving those issues.

38. FED. R. CIV. P. 45.

39. FED. R. CIV. P. 36(b).

40. Such a course sometimes might not be feasible in light of the common use of court designated lead and liaison counsel, who sometimes will not formally represent those who were parties in the same antecedent action as the party to whom a Rule 33, 34, 35, or 36 request is to be made. However, even then, lead counsel may be authorized to serve discovery requests on behalf of parties to the same antecedent action as the party to whom a Rule 33, 34, 35, or 36 request is to be made.

Reinforcing, and perhaps prompting, litigants' uncharacteristically accommodating behavior in this regard, courts typically take a practical, rather than a punctilious, approach to discovery in consolidated cases. Courts often deem to be incorporated in all of the consolidated cases all discovery previously taken in any of the consolidated cases (without requiring any identity of parties) and order all post-consolidation discovery, including that taken by devices available only to or against parties, to be served upon each of the parties in any of the consolidated cases or upon lead or liaison counsel who then have the responsibility for distributing it among those aligned with their clients.⁴¹ (The flip side of this coin is that courts may compel litigants whose cases have been swept into the consolidation to contribute a fair share of the discovery-generated expenses incurred by counsel responsible for discovery.⁴²) Where the court has not

41. See, e.g., *Ikerd v. Lapworth*, 435 F.2d 197, 205-06 (7th Cir. 1970) (concluding that the court did not err in permitting the use of depositions against a plaintiff whose case had not been filed when the depositions were taken, where that plaintiff's case had been consolidated with that in which the depositions were taken, counsel present at the depositions took the leading role at trial for both plaintiffs, the issues in the cases were factually and legally substantially identical, and the party present at the depositions had the same motives to question the witnesses that the other party would have had, so no prejudice was shown); *Lloyd v. Industrial Bio-Test Lab., Inc.*, 454 F. Supp. 807, 812 (S.D.N.Y. 1978) (allowing discovery taken in one consolidated component to be used in the other); *United States v. Lee Way Motor Freight, Inc.*, 7 E.P.D. ¶ 9066, at 6470, 6496 (W.D. Okla. 1973) (predicating conclusions of law in part on statistical information obtained from interrogatory answers filed in a private suit originally consolidated with the present action, but settled prior to trial); *Wiener v. United States*, 192 F. Supp. 789, 793 (S.D. Cal.) (ordering listed discovery to be deemed incorporated in the consolidated cases and a part thereof), *rev'd on other grounds*, 286 F.2d 302 (9th Cir. 1961); see also *Stewart v. Sullivan*, 506 P.2d 74, 75-76 (Utah 1973) (holding dismissal of consolidated cases for failure of the plaintiff to answer interrogatories in only one component to be error that justified substitution of dismissal without prejudice, particularly where the plaintiff had answered substantially identical interrogatories in the other component and, after consolidation, the information was available to all parties). The Sample Case Management Order After Initial Conference and the Sample Order Prescribing Responsibilities of Designated Counsel, in the *MANUAL FOR COMPLEX LITIGATION*, *supra* note 14, at 367-74, suggest service on liaison counsel supplemented by further distribution by such counsel. Cf. *Kramer v. Boeing Co.*, 134 F.R.D. 256, 259 (D. Minn. 1991) (where the court refused to consolidate a settled case with this action for the purpose of making use of discovery taken in the settled suit and there put under a protective order).

42. Lead and liaison counsel sometimes have sought to compel such contributions from persons whose claims were not encompassed by the consolidation, if those persons benefited in any way from the discovery taken in the consolidated cases. Courts have balked at that, citing the absence of authority to enter such an order. See *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 166 (4th Cir. 1992) (reversing, as beyond the power and jurisdiction of the court, an order providing a funding mechanism to reimburse plaintiffs' lawyers for discovery-generated expenses, insofar as the order applied to persons with claims based on injury from L-Tryptophan but who did not have cases within the multidistrict litigation; the court found, *inter alia*, that the order also threatened to interfere with discovery in state court proceedings); *Hartland v. Alaska Airlines*, 544 F.2d 992 (9th Cir. 1976) (holding that the court had no jurisdiction to require persons not parties to multidistrict litigation to contribute to a fund to

incorporated in all of the consolidated cases all discovery previously taken in any of the consolidated cases, the parties must be scrupulous, however, for courts may fault parties for failing to properly designate the cases in which their responses to discovery belong or for assuming that their pre-consolidation responses will do "double duty" and be given effect in components of a consolidation other than that in which they were filed.⁴³ Regarding a consolidation for all purposes or for trial as a single civil action could obviate this problem by "automatically" rendering all discovery taken (before or after consolidation) in any of the components discovery "in" all the components.

Of course, even considering a consolidation to be a single civil action would not justify imposing sanctions on parties other than those who are guilty of sanctionable conduct.⁴⁴ Consolidation may influence sanctions in other respects, however, such as legitimating the imposition of sanctions in a component other than that in which some of a litigant's offending conduct occurred. Recognizing the practical unity of a consolidation, the Fifth Circuit in *Smith v. Legg (In re United Markets International, Inc.)*,⁴⁵

cover costs and attorneys' fees attributable to establishing defendant's liability); *In re Aircraft Disaster at Juneau, Ala.*, on Sept. 4, 1971, 64 F.R.D. 410, 415 (N.D. Cal. 1974) (enforcing an order compelling plaintiffs in consolidated litigation to contribute to a fund for plaintiffs' lawyers).

43. See, e.g., *General Office Prods. Corp. v. A.M. Capen's Sons, Inc.*, 780 F.2d 1077, 1079-80 & n.2 (1st Cir. 1986). In that case, two cases had been consolidated for discovery and pretrial conference purposes. A defendant in one of the actions moved for summary judgment and the plaintiff in both actions failed to submit crucial interrogatory answers to the court in support of its opposition to the motion, in the belief that the answering party had filed them and in reliance on the consolidation to allow interrogatories from one case to support its objection to summary judgment in the other. The trial court criticized this conduct, but ultimately did consider the materials, concluding that they were insufficient to defeat summary judgment. See also *Sellick Equip. Ltd. v. United States*, 16 I.T.R.D. (BNA) 1491, 1494-95 (1994) (criticizing defendant Sellick for failure to properly designate the case or cases to which his interrogatory answers applied, although the interrogatories in the two consolidated cases were identical; not requiring him to duplicate his already submitted answers, but finding those answers unsatisfactory and in need of supplementation).

44. See *Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 606-07 (6th Cir. 1985) (reversing dismissal of complaints for failure of plaintiffs to comply with discovery orders where the court dismissed each plaintiff's action although only some of the plaintiffs had failed to comply with discovery requests, and the appellate court could not determine the legal or factual basis of the lower court's decision; emphasizing that the cases had been consolidated, but applying the principle that one party to litigation will not be subjected to sanctions because of the failure of another to comply with discovery, absent control of the noncomplying party by the sanctioned party). In light of that principle, the result would be the same if the consolidation were treated as a single civil action. *Independent Investor Protective League v. Touche Ross & Co.*, 607 F.2d 530, 530-31 & n.1 (2d Cir.), cert. denied, 439 U.S. 895 (1978) (entering final judgment as a sanction in one component case provided that it was to have no effect on the consolidated action).

45. 24 F.3d 650 (5th Cir.) (per curiam), cert. denied, 115 S. Ct. 356 (1994) (mem.).

recently affirmed a variety of sanctions (including orders striking an answer, counterclaim, and cross-claims, and prohibiting a litigant from filing further pleadings in an action) that were predicated upon the litigant's failure to pay sanctions in a different component of the consolidation and upon his general pattern of behavior during the litigation.⁴⁶ The parties apparently did not even argue that such action was inappropriate because the court was imposing sanctions "across" cases.

At least in appellate circuits that treat case consolidations as individual actions for appeals purposes,⁴⁷ the courts also may differentiate between components in determining the time at which a person may appeal from discovery sanctions. In *Roberts v. American Energy Resources, Inc.*,⁴⁸ the Court of Appeals for the Ninth Circuit held that it lacked appellate jurisdiction to hear a case in which the appellant was a party and accordingly might obtain review, after final judgment, of sanctions for conduct in his capacity as counsel. At the same time, the court upheld its jurisdiction to hear the same appellant's interlocutory appeal from discovery sanctions in two additional consolidated cases in which he was not a party. Although the opinion is unclear, the same conduct appears to have been the basis of the sanctions in all three consolidated cases. If so, it made little sense not to hear all the appeals simultaneously.⁴⁹ If the court had treated the consolidation (assuming it was for all purposes or at least for trial) as a single civil action, the attorney would have been a party to it and his appeal would have been postponed until after final judgment, absent an applicable exception to the final judgment rule.

To summarize, treating a consolidation as a single civil action would facilitate discovery among parties to different components by allowing them to use the full arsenal of discovery devices against one another and by obviating the need for subpoenas in connection with inter-party discovery. To so regard consolidations would provide a theoretical platform for what courts and litigants already usually do, and would bring into line the courts that are surprising litigants, to their detriment, when those courts fail to regard discovery from one component as discovery in an entire consolidation. Treating a consolidation as a single civil action also would conserve

46. *Id.* at 653, 655 & n.15, 656.

47. See Steinman, *supra* note 1, at 794-96.

48. No. 90-16504, 1991 WL 166416 (9th Cir. filed Aug. 30, 1991) (not appropriate for publication and not to be cited to or by the courts in the Ninth Circuit except as provided by 9TH CIR. R. 36-3), 942 F.2d 793 (9th Cir. 1991) (opinion not produced).

49. Little effort by the appellate court would be required, however, if the sanctioned attorney bothered to raise the question anew after the additional final judgment was entered.

appellate resources when persons who are parties to some, but fewer than all, of the consolidated cases appeal discovery rulings.

C. Voluntary Dismissal

Rule 41(a) of the Federal Rules of Civil Procedure provides in part that “an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.”⁵⁰ When cases have been consolidated, the question arises whether all the parties to all components of the consolidation have to stipulate to the dismissal or whether only the parties to the action brought by the plaintiff who seeks to voluntarily dismiss must so stipulate.

For the reasons that follow, I conclude that Rule 41(a) should be interpreted so that a plaintiff who desires to dismiss an action by filing a stipulation of dismissal should have to get the stipulation of all the parties to all components of the consolidation. Absent such a requirement, the interests of those other parties may be injured, whereas imposition of the requirement ordinarily will not impose a substantial burden on the plaintiff, particularly if the court empowers lead counsel to stipulate on behalf of all whom she represents. If the burden of acquiring all parties’ stipulation is onerous, or if some parties refuse to stipulate, the plaintiff can seek a court order allowing dismissal.

50. FED. R. CIV. P. 41(a). The Rule earlier provides that a plaintiff may dismiss without order of court “(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first . . .” *Id.* Both of these provisions are “[s]ubject to the provisions of Rule 23(e) [governing class action settlements], of Rule 66 [concerning the appointment of receivers], and of any statute of the United States.” FED. R. CIV. P. 41(a). Ordinarily, if a plaintiff were to voluntarily dismiss pursuant to this provision, plaintiff would do so before the action had been consolidated with any others. Moreover, unless and until the plaintiff had filed a claim against a party “from” another component of the consolidation, no such party would be filing an answer or a motion for summary judgment with respect to any claim of the plaintiff. Consequently, the question would seldom arise whether a litigant “from” another component of the consolidation was someone whose answer or summary judgment motion terminated the plaintiff’s right to voluntarily dismiss under Federal Rule of Civil Procedure 41(a)(i). In the unlikely event that, at the time such a party answered plaintiff’s claim against him or so moved, the original defendants had neither answered nor so moved, I would think that the service of this party’s answer or motion *would* cut off the plaintiff’s right. However, as the rule has been interpreted, it would cut off the plaintiff’s right to voluntarily dismiss only as to the responding party. Where there are multiple defendants, the filing of an answer or a motion for summary judgment by one of them does not foreclose plaintiff’s ability to utilize Federal Rule of Civil Procedure 41(a)(i) as to any other defendant who has not served an answer or such a motion. *Sheldon v. Amperex Elec. Corp.*, 52 F.R.D. 1, 9 (E.D.N.Y.), *aff’d*, 449 F.2d 146 (2d Cir. 1971). See generally 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2363, at 254–55 & n.7 (1995).

In the sole case I found that dealt directly with this question, the district court had concluded that Rule 41(a)(1) had not been complied with because all the parties to the consolidated cases had not agreed to the proposed settlement that was the predicate for the stipulation of dismissal.⁵¹ The court had consolidated three foreclosure actions brought by the United States and a receivership action.⁵² Even before the formal consolidation, the parties had tacitly treated the actions as one. In the trial court's view, the objections to the various proposed settlement agreements in the foreclosure actions demonstrated the interrelatedness of the actions and the importance of treating them as one. Settlement of only some of the cases would have affected the interests of the litigants in the other components of the consolidation. Settlement of the foreclosure actions also would have had an effect on the receivership ordered by the court in the other of the consolidated cases and on properties within the registry of the court, while leaving a number of issues unresolved. For these reasons, it was impossible to reach an equitable settlement unless the litigation was resolved in toto, and partial resolution was not in the public interest. Given these circumstances, the court held both that Rule 41(a)(1) was not satisfied absent agreement by all the parties to all of the consolidated cases, and that the

51. *United States v. Mansion House Ctr. N.*, 95 F.R.D. 515, 517-18 (E.D. Mo. 1982) (cited with approval in *Green v. Nevers*, No. 92-CV-76881-DT, 1993 U.S. Dist. LEXIS 7348, at *27-*30 (E.D. Mich. Apr. 13, 1993)), *rev'd sub nom. Rimmel v. Mercantile Trust Co. Nat'l Ass'n*, 742 F.2d 476, 476-77 (8th Cir.), *supplemental op.*, *United States v. Altman*, 750 F.2d 684 (8th Cir. 1984).

52. To sketch all the claims and relationships in this consolidation would be difficult and unnecessary for present purposes. In short, Towers had entered into a twenty-year renewable lease of the South Tower of the Mansion House Center with Rimmel, receiver of the Mansion House properties, appointed by the court upon motion of the United States, following the owner-partnerships' mismanagement of the property and default on HUD insured mortgage loans. The claims involved included, without limitation, the following: Towers filed an action (87-1896) alleging breach of the lease by the receiver. The receiver counterclaimed, alleging wrongful conduct by Towers. See *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766, 767 & nn.1-2 (8th Cir. 1989). HUD had earlier filed suit against the mortgagors for recovery of improperly expended funds, and the president of the Mansion House properties had initiated two Chapter XII bankruptcy proceedings. Disputes had ensued concerning the obligation of the receiver to surrender assets and concerning the rights of the company president to assert an ownership interest in the properties. The United States had filed three foreclosure actions for default on its mortgages. Mercantile Trust Company had sued the receiver, HUD, and the owner-partnerships for repayment of a conversion loan. These and additional complications are discussed in *United States v. Altman*, 750 F.2d 684, 686-89 (8th Cir. 1984).

policies behind Rule 66⁵³ required court approval prior to dismissal of any aspect of the litigation.⁵⁴

The Court of Appeals for the Eighth Circuit reversed, concluding that "it would be inequitable to require Mercantile Trust Company [a creditor, party to one of the foreclosure actions] to remain hostage to the ongoing and complex disputes of the other Mansion House litigants."⁵⁵ In a supplemental opinion, the appellate court stated that it had directed the district court to consolidate the actions for administrative convenience and economy and that, in deciding the Rule 41 issue, the district court had "failed to give proper consideration to the separate character of each individual case."⁵⁶ Citing *Johnson v. Manhattan Railway Co.*,⁵⁷ it faulted the district judge for failing to recognize that, even after consolidation, the cases retained much of their separate identity.⁵⁸ The Eighth Circuit also viewed the district judge as having "erroneously considered the receiver in the collateral litigation to be a receiver in [the] foreclosure cases,"⁵⁹ although the consolidation did not automatically have that effect. It concluded that, "[w]ithout an effective appointment of a Receiver to the foreclosure action . . . Rule 66 provides no support for the district court's entry of the order enjoining the settlement of the foreclosure litigation,"⁶⁰ and remanded with directions to permit consummation of the settlement of the foreclosure litigation.⁶¹

I believe that the Eighth Circuit took an unduly formalistic and unrealistic approach. It invoked *Johnson* and "black letter" principles concerning the operation of consolidation without any apparent thoughtfulness concerning the implications of its decision, given the realities of the specif-

53. Federal Rule of Civil Procedure 66 provides in part that "[a]n action wherein a receiver has been appointed shall not be dismissed except by order of the court." Citing 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2982, at 13 (1973 & Supp. 1994), the *Mansion House* court described the policy of the Rule as preventing a party from causing the court's investment in a receivership to be wasted. *Mansion House*, 95 F.R.D. at 517. See also 12 WRIGHT & MILLER, *supra*, § 2981, at 9.

54. *Mansion House*, 95 F.R.D. at 517-18.

55. *Rimmel*, 742 F.2d at 476-77.

56. *Altman*, 750 F.2d at 696.

57. 289 U.S. 479 (1933).

58. *Altman*, 750 F.2d at 695.

59. *Id.* at 696.

60. *Id.*

61. *Id.* at 697.

ic case before it. For all the reasons stated by the district judge, it made sense not to permit a voluntary dismissal predicated upon a "settlement" that was objectionable to interested persons who were parties to other components of the consolidation. If one viewed the consolidation as a single civil action, as I have urged, their participation in the stipulation to dismiss clearly would have been required. Similarly, although the consolidation did not (and under my position as well would not) in and of itself alter the authority of the receiver, the district court was correct to conclude that the policies underlying Rule 66 justified requiring judicial approval of any settlement of these inextricably interrelated cases. The proposed foreclosure settlement agreements between the United States and the owners of Mansion House, and between Mercantile Trust Company, a creditor of Mansion House, on the one hand, and the United States and the owners of Mansion House, on the other, were set against the backdrop of a receiver having been appointed to preserve the Mansion House properties.⁶² Mercantile and the receiver had been in litigation concerning the former's claims,⁶³ and the foreclosure actions brought by the United States involved the Mansion House properties. Typically, creditors' rights to property under the control of a receiver are fixed as of the receiver's appointment and any judgment won by a creditor, as the result of an action then pending, must be presented to the receivership court for payment.⁶⁴ "[A]ll rights to the property in question must be adjusted by the appointing court for as long as it has jurisdiction, which is until the receivership is terminated."⁶⁵ Under these circumstances, it is hard to understand why the appeals court did not view the policies underlying Rule 66, if not the literal language of the rule, to justify judicial approval as a prerequisite to voluntary dismissal of any of the related cases. Certainly, if one viewed the consolidation as a single civil action, as I have urged, Rule 66 would have literally applied and prohibited dismissal, absent a court order.

62. *Id.* at 686.

63. *Id.* at 688.

64. 12 WRIGHT & MILLER, *supra* note 53, § 2985, at 39-40.

65. *Id.* at 40.

The subsequent history of the case also seems to support the district court's view of the entangled nature of the consolidated disputes: None of the cases was resolved until the parties reached an omnibus settlement of all the claims in the consolidated actions.⁶⁶

One might be concerned that requiring *all* parties who have appeared in consolidated cases to join *any* plaintiff's stipulation of dismissal might impose an unduly onerous burden on the plaintiff who seeks to dismiss. However, as illustrated by the Mansion House litigation, the policies that underlie Rule 41 may apply to the parties from components of consolidated cases other than the component brought by the plaintiff who now seeks to voluntarily dismiss. Rule 41 is designed to give plaintiffs the right to remove an action from the domain of the court, without obtaining the consent of the court, if no other party will be prejudiced.⁶⁷ The rule presumes that a defendant against whom the plaintiff pleaded a claim will not be prejudiced if that defendant has not expended the time and effort entailed

66. Telephone interview with James F. Gunn, attorney for Mansion House (Oct. 17, 1994). Following the decision described in the text, the Department of Housing and Urban Development (HUD), one of the parties to the proposed settlement at issue in *Altman*, declared the foreclosure settlement agreement to be null and void, a declaration that the courts upheld. See *United States v. Mansion House Ctr.*, 607 F. Supp. 392 (E.D. Mo. 1985), *aff'd*, 796 F.2d 1039 (8th Cir. 1986). Thereafter, the parties reached a settlement of most of the substantive issues. See *United States v. Mansion House Ctr.*, 767 F. Supp. 995, 997 (E.D. Mo. 1991). The court stated that on January 19, 1984, Towers Hotel Corporation and the receiver signed the "Second Restated Settlement Agreement," but the documents effectuating it were not ordered executed until this opinion of the court, entered July 8, 1991. The court discussed various claims of Towers, the receiver, and other parties. It concluded:

This order and memorandum are intended to provide a comprehensive resolution of the remaining disputes in the Mansion House litigation. The Court anticipates that the final determination of the single claim on which damages remain to be ascertained, expected within the coming weeks, will be the end of active litigation concerning Mansion House before this Court.

Id. at 1008.

67. See, e.g., *Marex Titanic, Inc. v. Wrecked and Abandoned Vessel, RMS Titanic*, 805 F. Supp. 375, 377-78 (E.D. Va. 1992) (stating that Rule 41 allows voluntary dismissal of right at early stages of litigation when defendants would not be prejudiced), *rev'd on other grounds*, 2 F.3d 544 (4th Cir. 1993); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985) (stating that purpose of the rule is to preserve "plaintiff's right to take a voluntary nonsuit and start over, so long as defendant is not hurt"); *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) (same). See generally 9 WRIGHT & MILLER, *supra* note 50, §§ 2362-63.

in either answering the complaint or filing a motion for summary judgment or if he stipulates to the dismissal.⁶⁸ In ordinary litigation, if a plaintiff seeks to utilize Rule 41(a)(ii) (presumably because the opportunity to take a Rule 41(a)(i) dismissal has passed), *all* parties who have appeared in the action must sign a stipulation of dismissal to enable the plaintiff to voluntarily dismiss any of its claims, without permission of the court. Where cases have been consolidated for all purposes or for trial (and likely arose from the same transaction, occurrence, or series thereof),⁶⁹ there is a sufficient possibility that parties from other components of the case would be adversely affected by a voluntary dismissal of claims that their acquiescence via stipulation, or a court order, ought to be required when a plaintiff can no longer unilaterally dismiss. Of course, an adverse effect will not always be present, particularly since, if a party from one component is not also a party to the action in which the plaintiff wants to dismiss one or more claims, the actions are likely to be merely related, but not repetitive or reactive.⁷⁰ Nonetheless, either the plaintiff who seeks to voluntarily dismiss claims or other plaintiffs may have asserted claims against remaining parties, the prosecution of which could be influenced by the voluntary dismissal of some defendants or claims.⁷¹ As in the *Mansion House* cases, a proposed voluntary dismissal may be predicated upon a settlement that would affect persons who are parties to the consolidation but not to the settlement agreement.

In huge consolidations, the burden of obtaining stipulations from a large number of parties will be eliminated if the court can authorize lead counsel to stipulate on behalf of all co-parties. In light of lead counsel's authority to act on behalf of the consolidated parties with respect to other matters of great import to the conduct of the litigation, such authority would seem to be appropriate.

Finally, any harshness to the plaintiff (of a rule requiring the stipulation to be joined by all parties who have appeared in the consolidation) is tempered by the ability of the court to dismiss at a plaintiff's request,

68. See *supra* note 50.

69. See Steinman, *supra* note 1, at 777, 787-89.

70. See *id.* at 725-26.

71. Cf. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1165, 1169 (9th Cir. 1994). Where one of several plaintiffs sought to voluntarily dismiss its claims because the cost of pursuing the litigation outweighed the potential recovery, the court denied the motion until plaintiff fully complied with outstanding discovery orders; plaintiff's participation was necessary for adequate preparation of defendants' defense, since plaintiff was "inextricably entangled in the complex fraud claims." *Id.*

under Rule 41(a)(2).⁷² If seeking the stipulation of every party would be unreasonably onerous or if a party to the consolidation refuses, without good reason, to join a stipulation to dismiss, the plaintiff is not thereby precluded from dropping the suit; she need only get a court order. If there are no good reasons for a court to impose any terms and conditions upon the dismissal, the court should, and presumably would, order dismissal without any such impositions upon the plaintiff. Courts generally allow dismissal so long as defendants would not be seriously prejudiced.⁷³

For all of these reasons, Rule 41(a) of the Federal Rules should be interpreted so that a plaintiff who desires to dismiss an action by filing a stipulation of dismissal must get the stipulation of all the parties to all components of the consolidation. Absent such a requirement, the interests of other parties may be injured, whereas imposition of the requirement ordinarily will not impose a substantial burden on the plaintiff, particularly if the court empowers lead counsel to stipulate. If the burden is onerous, or some parties refuse to stipulate, the plaintiff has the alternative of seeking a court order allowing dismissal.

III. NON-RULE BASED ISSUES

A. Choice of Law

An arguably procedural matter on which consolidation may come to have an impact is choice of law as among the state law doctrines that might govern cases, or as among the competing versions of federal law that exist when the circuits are in conflict. Although, to this point, consolidation

72. Federal Rule of Civil Procedure 41(a)(2) provides in part: "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." The Rule continues: "If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." Under the broad view of "counterclaim" that I have advocated, a defendant "from" another of the cases that has been consolidated may have "counterclaimed" against the plaintiff who seeks dismissal of its claims. The above quoted provision would apply. However, in view of the probability that an action consolidated for all purposes would have arisen out of the same transaction, occurrence, or series thereof, it is likely that if the counterclaim lacked an independent basis of subject matter jurisdiction, it would be within the court's supplemental jurisdiction by virtue of other claims encompassed by the consolidation. Then, the counterclaim would not hinder the dismissal sought by a particular plaintiff.

73. See generally 9 WRIGHT & MILLER, *supra* note 50, § 2364, at 279-80, 293.

has not altered choice of law, under some current proposals the consolidation of cases sometimes would alter the choice of substantive law to govern the merits of disputes. I do not believe, however, that treating a consolidation for all purposes or for trial as a single civil action *itself* would have any effect on choice of law. That is, such consolidation would not alter either the constitutionality of the choice of law to govern claims in the litigation or the dictates of the law applicable when cases are transferred before consolidation. To determine the substantive law that should govern the issues and claims that are subject to *state* law, a federal court must apply the choice of law rules that would be applied by the courts of the state in which it sits.⁷⁴ When a federal court hears consolidated cases, it must go through this exercise for each case before it. If a transferor federal court had subject matter and personal jurisdiction and was a proper venue, a federal transferee court must determine the applicable law in precisely the fashion that the transferor court would have employed.⁷⁵ When a transferee court hears consolidated cases, it must go through this exercise for each case before it.⁷⁶ District courts in some circuits go through a similar process when faced with consolidated federal law cases, some of which were transferred. That is, while some circuits take the view that the federal law

74. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941) (stating that, in a diversity case, a federal court must follow the choice of law rules prevailing in the state in which it sits), *remanded*, 125 F.2d 820 (3d Cir.), *cert. denied*, 316 U.S. 685 (1942); *see* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (stating that, in a diversity case, a federal court must apply substantive state law); *cf.* *Caribbean Wholesales & Serv. Corp. v. US JVC Corp.*, 855 F. Supp. 627, 632 (S.D.N.Y. 1994) (indicating that when a court transfers a case based on a forum selection clause, the transferee federal court should apply the choice of law of the state in which it sits if the transferor state court would have dismissed the action for forum non conveniens, but should apply the choice of law of the transferor state if the transferor state court would have adjudicated the action).

75. *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (requiring application of the law that the transferor court would have applied, even when plaintiff sought the transfer); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (stating that where defendants seek transfer under 28 U.S.C. § 1404(a), the transferee court must apply the state law that would have applied absent transfer). Of course, if the transferor court lacked personal jurisdiction or was an improper venue, there is no reason to look to the law that the transferor court would have applied. The transferee court operates as if the transferred cases had been filed in it. *See, e.g., Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110–11 (5th Cir. 1981) (stating that if a diversity case has been transferred pursuant to 28 U.S.C. § 1406(a), the transferee court should use the choice of law rules of the state in which it sits); *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980) (same).

76. *See* Steinman, *supra* note 26, at 1061–62. The transferee court may, however, seek the parties' consent to the application of a particular body of substantive law. *See, e.g., In re Bendectin Litig.*, 857 F.2d 290, 295 (6th Cir. 1988) (where the district judge permitted consolidation on liability issues for cases transferred for pretrial, but required plaintiffs who voluntarily chose to participate in the common issues trial to consent to application of Ohio law), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 488 U.S. 1006 (1989).

as interpreted in the transferee court should be applied to all cases adjudicated there,⁷⁷ other circuits require their district courts to apply the inter-

77. See, e.g., *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (stating that when reviewing federal claims, a § 1404(a) transferee court in this circuit is bound only by this circuit's precedent; court applied transferee law to Lanham Act claims); *In re Pan Am. Corp.*, 950 F.2d 839, 846-48 (2d Cir. 1991) (applying transferee court's law with respect to preemption by the Warsaw Convention); *Wegbreit v. Marley Orchards Corp.*, 793 F. Supp. 965, 968-69 (E.D. Wash. 1992) (applying transferee court's law regarding borrowing of statute of limitations for 1934 Act securities law claim); *Northwest Airlines, Inc. v. McDonnell Douglas Corp.* (*In re Air Crash at Detroit Metro. Airport*, on Aug. 16, 1987), 791 F. Supp. 1204, 1212-13 (E.D. Mich. 1992) (applying transferee court's law determining the preclusive effect of federal judgments in diversity cases); cf. *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126-27 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994). In *Eckstein*, the court concluded that a transferee court normally should use its own best judgment about the meaning of federal law, but that § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), requires otherwise with respect to the choice of statute of limitations in suits under § 10(b). "When the law of the United States [i.e., federal law] is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes 'but a change of courtrooms.'" *Eckstein*, 8 F.3d at 1126-27.

For cases consolidated under 28 U.S.C. § 1407 (1982) in which the court held that the transferee court should apply the federal law as interpreted in the circuit in which it sits, see, for example, *Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (holding that to serve, *inter alia*, goals of administrative efficiency, a federal transferee court acting under 28 U.S.C. § 1407 should apply its own interpretations of federal law, not the constructions of the transferor court); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987) (holding similarly with respect to the applicability of the Warsaw Convention's per passenger damage limitation), *aff'd on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915-22 (D.D.C.) (following *Eckstein* in concluding that the LMRA and ERISA direct the application of geographically non-uniform limitations periods, in particular, the limitations periods that the transferor fora respectively would have applied, notwithstanding that a transferee court normally should use its own best judgment about the meaning of federal law when adjudicating federal claims), *recons. denied in part on other grounds*, 156 F.R.D. 507 (D.D.C. 1994); *Burke v. Northwest Airlines, Inc.* (*In re Air Disaster*) 819 F. Supp. 1352, 1369-71 (E.D. Mich. 1993) (applying transferee court's law with respect to complete preemption analysis); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 815 F. Supp. 620, 635-37 (S.D.N.Y. 1993) (applying transferee court's limitations period with respect to 1934 Act securities law claims), *appeal dismissed for want of app. jur. sub nom. Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc.* (*In re Integrated Resources, Inc.*), 3 F.3d 49 (2d Cir. 1993); *In re Taxable Mun. Bond Sec. Litig.*, 796 F. Supp. 954, 964 (E.D. La. 1992) (applying transferee court's federal limitations law to 1934 Act securities law claims); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1493, 1496 (D. Colo. 1989) (applying transferee court's law with respect to admissibility of evidence), *rev'd, remanded sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992). See generally Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984); Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 639-41, 665-70 (1987) (in § 1407 litigation, the transferee court should have discretion to use its own law to encourage efficient and uniform handling of cases).

One district judge has suggested that the filing of a consolidated complaint lends support to applying the law of the transferee court because all plaintiffs have filed a new complaint in that court. See *Murphy*, *supra* note 14, at 608 (describing the argument but stating that she did not necessarily subscribe to it). Neither Judge Murphy nor I know of any precedent in support of that

pretations of federal law accepted in the respective transferor courts to cases that were properly brought.⁷⁸ Taking this approach, different versions of the same federal law may be applied to the various consolidated cases. The choice of law doctrine applicable in state law cases and in those federal courts that use the latter approach to federal law cases is problematic, "because it results in different states' laws [or different versions of federal law] governing different issues, claims, and parties in a single consolidated case. This makes the courts' task very difficult and leads to results that differ among similarly situated litigants."⁷⁹ This state of the law also may threaten or impede consolidations because it reduces the occasions on which common questions of law or fact justify consolidations.⁸⁰

Consequently, law reform groups and others have proposed changes in the system. Under a proposal of the American Law Institute, generated by its Complex Litigation Project, for example, Congress would specify federal choice of law principles for federal intrasystem consolidations.⁸¹ For present purposes, the details of those principles are less important than the general point that, if such a proposal were to become law, the consolidation of cases sometimes would alter the choice of substantive law to govern the merits of disputes. As a result, consolidation sometimes would alter the

position, however.

78. See, e.g., *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758 (5th Cir. 1974) (applying transferee court's law with respect to the limitations period on 1934 Act securities law claims); *In re Rospatch Sec. Litig.*, 760 F. Supp. 1239, 1256-57 (W.D. Mich. 1991) (same); cf. *Eckstein*, 8 F.3d at 1126-27; *United Mine Workers*, 854 F. Supp. at 915-22.

79. Steinman, *supra* note 26, at 1063 (footnote omitted).

80. Looking to the law of transferor courts may reduce the occasions when common questions of fact justify consolidation because different bodies of law may make different sets of facts relevant.

81. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 305-09, 321-436 (1994) [hereinafter A.L.I. RECOMMENDATIONS]; cf. ABA Comm. on Mass Torts, Report to the House of Delegates, Recommendation 3, at ii (1989) ("When state law provides the rule of decision, . . . legislation should mandate a federal court presiding over consolidated mass tort litigation to select applicable state(s) law(s) by choice of law standards developed by the federal courts in light of reason and experience.") This proposal, too, advocated different choice of law principles for certain consolidated litigation than would apply to other litigation.

outcome of litigated disputes. Consolidation would then alter both the procedural and the substantive rights of litigants, and would do so whether or not one regarded the consolidation as creating a single civil action or as rendering the parties in one component parties to another or to a larger whole.⁸²

Such alteration of rights is not necessarily an argument against the A.L.I. Recommendations or against any choice of law principles that Congress might enact for consolidated cases. A great deal can be said for the uniformity, within a consolidation, that such a system of rules would generate. The drafters of the Recommendations advocate a federalization of choice of law rules for consolidated cases as "necessary to foster the fair and efficient handling of complex litigation,"⁸³ necessary "to foster the consolidation of multistate, multiforum litigation and thereby to achieve greater parity in the treatment of persons . . . similarly harmed by the same course of conduct,"⁸⁴ and necessary "to decrease forum shopping and . . . the extremely complicated inquiry now needed to ascertain and apply the numerous state choice of law rules that may be relevant."⁸⁵ The drafters regard the need to assure uniform and economical handling of disputes as justifying a disparity in treatment between parties in "complex" cases con-

82. It is true that the choice of law rules proposed by the A.L.I. rest on the premises that courts must examine choice of law questions on the basis of issues and claims (not cases as a whole) and that it is desirable for a single state's law to be applied to a particular issue, regardless of the number of parties to whom or claims in which that issue is common. *Id.* at 315-16. Moreover, one ordinarily would seek to apply a single state's law to an issue only within the confines of a single civil action, because the civil action is the usual litigation unit. However, while there are good reasons to treat a consolidation as a single civil action, I do not believe that the A.L.I. choice of law proposal is or needs to be predicated on that view of consolidations. For the reasons elaborated below, *see infra* text accompanying notes 92-94, I do not believe that whether one regards a consolidation as a single civil action affects choice of law analysis.

83. A.L.I. RECOMMENDATIONS, *supra* note 81, at 305.

84. *Id.* at 306.

85. *Id.* In light of the A.L.I. recommendation that Congress authorize transferee courts to assert jurisdiction over parties, limited only by a Fifth Amendment national contacts test, *id.* at 147, the drafters also argue that there is no persuasive reason a state should be able to effectuate its decisions on the extraterritorial reach of its substantive laws, as against persons who otherwise would be beyond the reach of state process. *Id.* at 307-08.

solidated pursuant to the provisions of the Recommendations⁸⁶ and parties to litigation not subject to transfer and consolidation under this scheme.⁸⁷

A number of scholars have criticized the approach proposed in the A.L.I. Recommendations and some have proposed different strategies for dealing with the underlying problems.⁸⁸ Under such alternative approach-

86. The A.L.I. Recommendations provide in part:

§ 3.01. Standard For Consolidation

(a) Actions commenced in two or more United States District Courts may be transferred and consolidated if:

- (1) they involve one or more common questions of fact, and
- (2) transfer and consolidation will promote the just, efficient, and fair conduct of the actions.

(b) Factors to be considered in deciding whether the standard set forth in subsection (a) is met include

- (1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and
- (2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses.

In considering those factors, account may be taken of matters such as

- a. the number of parties and actions involved;
- b. the geographic dispersion of the actions;
- c. the existence and significance of local concerns;
- d. the subject matter of the dispute;
- e. the amount in controversy;
- f. the significance and number of common issues involved, including whether multiple laws will have to be applied to those issues;
- g. the likelihood of additional related actions being commenced in the future;
- h. the wishes of the parties; and
- i. the stages to which the actions already commenced have progressed.

(c) When the United States is exempted by Act of Congress from participating in consolidated proceedings in actions under the antitrust or securities laws, it shall have the right to be exempted from transfer and consolidation under this section.

(d) Transfer and consolidation need not be denied simply because one or more of the issues are not common so that consolidated treatment of all parts of the dispersed actions cannot be achieved. The interests of particular individual litigants can be considered when determining whether they have shown cause to be excluded from the consolidated proceeding, as provided in § 3.05(a).

Id. at 37-38.

87. *Id.* at 308-09.

88. See Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 833 (1994) (primarily devoted to the choice of law provisions of the Project); Robert J. Witte, . . . Or Would You Rather Have What's Behind Door Number Two? *Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk?*, 59 J. AIR L. & COM. 617, 618 nn.2 & 4-5 (1994) (citing numerous articles arguing for or against proposals to federalize choice of law, particularly in mass

es, whether cases have been consolidated is often not a factor in the choice of law analysis. This Article does not undertake a close analysis or critique of the A.L.I. Recommendations; it leaves that to others.⁸⁹ As part of my effort to alert litigants and legal professionals to the actual and potential effects of consolidation on litigants' rights, I note that the A.L.I. Recommendations would alter litigants' rights as a function of the consolidation of their cases under the scheme proposed by the A.L.I.⁹⁰

I considered whether treating a consolidation for all purposes or for trial as a single civil action itself would have any effect on choice of law. I do not believe, however, that this treatment would alter either the constitutionality of the choice of law to govern any claims in the litigation or the dictates of the line of cases beginning with *Van Dusen v. Barrack*,⁹¹ which is applicable when cases were transferred before consolidation. *Phillips Petroleum Co. v. Shutts*⁹² clarified that, notwithstanding the burdens of meeting the constitutional requirements for choice of law in nationwide class actions, courts may apply to any given claim only the law of a state that has significant contact with that claim.⁹³ Since the claim is the locus of choice of law inquiry in a class action, there is every reason to believe that the claim also is the locus of choice of law inquiry in consolidations. Regarding a consolidation as a single civil action would not alter this touchstone for determining the constitutionality of a choice of law.

I also doubt that viewing a consolidation as a single civil action would permit courts to choose applicable law without regard to the dictates of the *Van Dusen* line of cases. It is true that neither *Van Dusen* nor its Supreme

tort litigation). Witte notes that recent proposals to bring about uniformity include proposals to generate a Restatement (Third) of Conflict of Laws, Multistate Canons of Construction for conflict situations, a promulgation by the National Conference of Commissioners on Uniform State Laws, a federal common law of choice of law rules, and federal choice of law legislation. *Id.* at 633-34, 640.

89. See, e.g., Symposium, *supra* note 88, at 833-1160.

90. In light of the balkanization of procedure that has occurred under the Civil Justice Reform Act and the latest amendments to the Federal Rules of Civil Procedure, litigants also may face uncertainty as to the version of the Federal Rules that will apply to their transferred and consolidated cases. Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 994-95 (1994). See generally Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992). Such uncertainty is a function of the Act, the amendments to Federal Rule of Civil Procedure 26, and transfer, however, rather than a direct function of consolidation.

91. 376 U.S. 612 (1964).

92. 472 U.S. 797 (1985), *cert. denied and mandamus denied*, 487 U.S. 1223 (1988).

93. *Id.* at 821 ("[T]he constitutional limitations on choice of law [are] not altered by the fact that it may be more difficult or more burdensome to comply . . . because of the large number of transactions.").

Court progeny confronted or addressed consolidations; in that sense they are distinguishable. Moreover, obedience to the *Van Dusen* line, in consolidated cases, imposes difficulties and burdens that tend to defeat the very purposes of consolidation: to undermine uniform and economical processing of consolidated disputes. But, in judging the propriety of choice of law decisions, the Supreme Court has not been persuaded by arguments predicated on considerations of burden and difficulty,⁹⁴ which arguably put the cart before the horse. Consolidation (or class treatment) is appropriate where the commonalities in law and fact make such treatment appropriate; if the commonalities are lacking, the consolidation is inappropriate. To consolidate first, and then insist that choice of law principles should be changed to allow uniform law to be applied may overvalue consolidation. Finally, courts never have viewed the policies that underlie the *Van Dusen* line of cases as inapplicable or overridden where cases were consolidated, and I do not see that calling the consolidation a single civil action should change that.

B. Jury Trial and Trial by Magistrate Judge

The interaction between case consolidation and jury trial is multifaceted. Several aspects of the interaction grow out of the language of Federal Rules of Civil Procedure 38 and 39;⁹⁵ others harken back to the right preserved by the Seventh Amendment to the Constitution⁹⁶ or to due process concerns. Based on the analysis that follows, this Article reaches several conclusions. First, in determining the time within which parties must make jury demands and in determining which parties must consent to withdrawal of a jury demand, far more desirable outcomes flow from treating consolidated cases as a single civil action than flow from treating the components as separate actions. Existing common law governing the circumstances under which amended pleadings give rise to a right to a jury demand and denying revival of waived rights would prevent abuse of the right to demand a jury, in the context of consolidated cases. Moreover, much existing case law measures the scope of general jury demands in a manner that produces ideal results for the trial of common issues in consolidated cases treated as a single civil action.

Treating consolidations in this manner similarly leads to the most desirable outcomes when the question is who may serve a jury demand in

94. See *id.*; *supra* text accompanying note 92.

95. FED. R. CIV. P. 38, 39.

96. U.S. CONST. amend. VII.

reaction to an issue-limited demand or who must consent to withdrawal of a jury demand. The treatment of consolidated cases as single civil actions can guide the law with respect to these questions at the same time that it enhances the legitimacy of the courts' existing jurisprudence concerning the exercise of discretion in affording jury trial as to issues, in consolidated cases, that otherwise would be heard by the judge. Finally, the courts should allow adjudication by magistrate judges only when all parties to cases consolidated for all purposes or for trial consent to such adjudication. This conclusion follows both from regarding such cases as single civil actions and from the absurdity of so consolidating cases and then allowing some components to be tried by the court while others are tried, in a duplicative proceeding, by a magistrate judge.

Rule 38 of the Federal Rules of Civil Procedure preserves the right of trial by jury as declared by the Seventh Amendment or as given by a federal statute.⁹⁷ It then provides in part:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d).

(c) Same: Specification of Issues. In the demand, a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Because parties must file jury demands shortly after sets of pleadings are closed,⁹⁸ jury demands often are due before cases are consolidated. In

97. FED. R. CIV. P. 38(a). The Seventh Amendment provides in part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" U.S. CONST. amend. VII.

98. "Sets of pleadings" refers to the complaint and answer(s), a counterclaim and reply(ies), and the like. See 5 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 38.39[2] (2d ed. 1994 & Supp. 1994-95).

those instances, the consolidation may have no impact on the timeliness of jury demands. However, when courts consolidate cases, they may order the parties to file joint or consolidated pleadings, or parties of their own accord may seek leave to file post-consolidation amended pleadings. In either circumstance, the question arises whether the filing of amended pleadings affects the time within which timely jury demands may be made.

The standard common law rule is that amended pleadings do not revive a previously waived right to demand jury trial on the issues framed by the original pleadings, although they do give rise to a right to demand a jury trial with respect to "new issues."⁹⁹ This rule has been applied in consolidated cases, and can be applied with no untoward consequences flowing from treating the consolidation as a single civil action. It is true that amended, particularly consolidated, pleadings may for the first time contain claims that some plaintiffs (or other parties) had not previously asserted against particular defendants (or other parties),¹⁰⁰ and that such pleadings may present new issues. In these circumstances, directly affected parties ordinarily will have a right to demand a jury as to the new claims or the new issues, which will not expire until ten days after service of the last pleading directed to such new claims or issues.¹⁰¹ However, the time for filing a jury demand will not be revived for those in the consolidation who already were party to the same claims or the same issues.¹⁰² Even if parties to different components of a consolidation are treated as multiple par-

99. See, e.g., *LaMarca v. Turner*, 995 F.2d 1526, 1545 (11th Cir. 1993) (holding that waivers apply only to the issues raised by the pleadings; subsequent amendments to the pleadings can raise new issues for which the right to a jury remains), *cert. denied*, 114 S. Ct. 1189 (1994); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 388 (10th Cir. 1990) (stating general principles). See generally 9 WRIGHT & MILLER, *supra* note 50, § 2320.

100. See, e.g., *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 262, 264 (D. Minn. 1989). See also discussion *supra* note 14.

101. *LaMarca*, 995 F.2d at 1545-46. There, the court held that where new plaintiffs raised new issues and claims, defendant's initial waiver of a jury did not preclude him from making an effective jury demand with respect to the new issues and new claims. To hold otherwise would permit a court's discretionary decision to permit joinder of new claimants to defeat the right to jury trial that defendant clearly would have enjoyed had the new claimants been required to file separate actions. However, defendant's initial waiver as to the original plaintiffs' claims remained effective. See 9 WRIGHT & MILLER, *supra* note 50, § 2320 ("[T]he time each defendant files his answer starts the ten-day period running for the issues raised between him and the plaintiff . . ."). But see *Pennsylvania ex rel. Feiling v. Sincavage*, 439 F.2d 1133, 1134 (3d Cir. 1971) (holding that where civil rights plaintiff amended complaint to add his wife as a plaintiff after his jury demand was denied as untimely, the court did not err in denying wife's demand for jury trial).

102. *Sincavage*, 439 F.2d at 1134 (holding that amendment to complaint, adding new plaintiff, did not revive previously waived right to jury trial); *Ed Brawley, Inc. v. Gaffney*, 399 F. Supp. 115, 118 (N.D. Cal. 1975) (holding that the amended complaint, adding a plaintiff who reasserted the original claims, did not revive original plaintiff's right to jury trial).

ties to a single action, in the posited situation the principle that the time for a jury demand runs from service of the last answer on an issue in which several defendants are interested¹⁰³ will not afford additional time to such other parties. Thus, while the parties as to whom issues were newly raised will be afforded the ten-day period for making a jury demand, and the failure of other parties to have made such a demand will be no bar,¹⁰⁴ the addition of new parties to a claim, or of new issues, will not revive the right to demand a jury for those who had an earlier opportunity, as to the issues on which they had that earlier opportunity.

Wholly apart from amended pleadings, however, consolidation may influence the time in which parties must file jury demands. Consolidation raises the question whether a pleading filed in one component can constitute "the last pleading directed to [an] issue" for purposes of another component or of the consolidation as a whole. For example, suppose A sues D for injuries A suffered in the crash of an airplane owned, maintained, and operated by D. D answers the complaint. Six months later, B sues D for injuries B suffered in the same crash. Both complaints allege negligent maintenance and negligent operation by D's employee, the pilot. Shortly before or shortly after D files an answer to B's complaint, the cases are consolidated for all purposes. Does D's answer to B's complaint constitute the last pleading directed to the negligence issues for purposes of determining when A must file a jury demand or when D must file a jury demand applicable to the negligence claims asserted by A?

The answer would seem to be "yes," a pleading filed in one component *could* constitute "the last pleading directed to [an] issue" for purposes of another component or of the consolidation as a whole, if cases consolidated for all purposes or for trial were treated as a single civil action. Such a pleading *would* constitute the last such pleading if filed after the consolidation. If filed before the consolidation, whether it would constitute the last pleading directed to an issue for purposes of Rule 38(b) would depend on whether a court was inclined to give the consolidation retroactive effect. Because parties' evaluation of the desirability of a jury may change with the contours of the litigation, with the number and identities of parties and

103. See, e.g., *Bentler v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 959 F.2d 138, 141 (9th Cir. 1992) (applying the above principle in context of jointly liable defendants); *Kaiser Steel*, 911 F.2d at 388 (stating general principles). See generally 9 WRIGHT & MILLER, *supra* note 50, § 2320.

104. *Butterfield v. Crist*, 52 F.R.D. 489, 490 (E.D. Wis. 1971) (holding that an added defendant could demand jury notwithstanding waiver of jury by original defendant); *Swofford v. B & W, Inc.*, 34 F.R.D. 15, 16-17 (S.D. Tex. 1963) (holding that failure of original plaintiff to demand jury trial did not operate as a waiver by subsequently added plaintiffs), *aff'd on other grounds*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

with the claims asserted, it would be reasonable to hold that parties should be afforded ten days after service of the last pleading directed to an issue to make a jury demand with respect thereto, whether the consolidation preceded or succeeded the filing of that last pleading. That is, both A and D should have ten days from the service of D's answer to B's complaint to file a jury demand applicable to the negligence claims asserted by A. If it strikes a court as problematic for the deadline for jury demands to be as elastic as the time frame during which pleadings might be exchanged in additional cases that come to be added to a consolidation, the court could adopt a more restrictive approach: Pleadings in different components of a consolidation could be treated by analogy to amendments adding parties.¹⁰⁵ As discussed above, such additions neither extend nor revive the right to demand a jury trial for those who had an earlier opportunity to make such a demand,¹⁰⁶ but they permit a jury demand as between the new parties and as to new issues.

Additional questions can be imagined. Particularly but not exclusively, if a party filed a timely "general" jury demand¹⁰⁷ *after* consolidation, the question might arise whether that demand was effective as to issues in other components of the consolidation, in which the jury-demanding person might or might not be a party. The persons party to other components might not want a jury, and the question would be put whether, by filing a general demand, "outsiders" could impose a jury trial. On the other hand, the persons party to those other components might want a jury and might rely on the initial jury demand (rather than filing their own), in the belief that it was effective as to their component.¹⁰⁸ Similarly, if the initial jury demand were issue-limited, the question might arise whether any other party within the consolidation, rather than only parties to the component in which the jury-demanding person was a party, would have ten days after service of the demand (upon whomever the court had ordered be served with papers) to serve a jury demand as to other issues of fact in the consolidated action, but not necessarily in the component in which the

105. In cases not affected by consolidation, the "same issue" could arise between additional parties only through amendment of the pleadings. Consequently, the analogy to the effect of such amendments on the time to demand a jury seems apt.

106. *But see infra* text accompanying notes 121-124 (regarding the courts' discretion to allow a jury trial despite parties' waiver of the right to such a trial).

107. That is to say, a jury demand not limited to specified issues.

108. As a general rule: "If a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues for which jury trial has been demanded may rely on that demand and need not make an additional demand of their own." 9 WRIGHT & MILLER, *supra* note 50, § 2318.

initial jury-demanding person was a party. Finally, if a party would like to withdraw a jury demand, the question would be posed whether the parties whose consent is necessary are the parties to all the components in the consolidation or only the parties to the component in which the demanding person is a party.¹⁰⁹

If consolidated actions are treated as distinct from one another, all the foregoing questions presumably would be answered, "No." If cases consolidated for all purposes or for trial are treated as a single civil action, the answers to all of the foregoing questions may be "Yes," pursuant to the black letter principle that a general jury demand will be regarded as a demand for jury trial *on all the issues in the case* to which a right to jury trial attaches.¹¹⁰ If the entire consolidation is "the case," within the meaning of that principle, the foregoing questions should be decided accordingly.

However, the analysis need not and should not be quite so simple and stark. Most appellate circuits do not read Rule 38(c) literally. The Second Circuit, for example, has limited the effect of a general jury demand to "those issues with which the demander is connected. . . . Thus, a party who demands a jury trial does not so demand for issues raised later with which he is unconnected."¹¹¹ This view also has the support of the oft-cited

109. A similar issue could arise under Federal Rule of Civil Procedure 39(a), which provides in part that:

[t]he trial of all issues [as to which jury trial has been] demanded shall be by jury, unless
(1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury

FED. R. CIV. P. 39(a).

The question would be who the parties are who need to so stipulate. Presumably, all parties would be required to stipulate as to whom any issue otherwise would be heard by a jury.

110. See, e.g., *Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1010 (4th Cir. 1981) (holding that general jury demand ran to all issues including those raised by the opposing party); *United States v. Anderson*, 584 F.2d 369, 372 (10th Cir. 1978) (holding that jury demand filed before reply to counterclaim was timely as to all issues where counterclaim raised same issues as complaint). See generally 9 WRIGHT & MILLER, *supra* note 50, § 2318.

111. *Sound Video Unlimited, Inc. v. Video Shack Inc.*, 700 F. Supp. 127, 145 (S.D.N.Y. 1988) (citing *Rosen v. Dick*, 639 F.2d 82, 91 (2d Cir. 1980)); accord, *Espinosa v. Van Dorn Plastic Mach. Co.*, 813 F. Supp. 252, 253 (S.D.N.Y. 1993). Other circuits hold similarly. See, e.g., *In re N-500L Cases*, 691 F.2d 15, 18, 21-24 (1st Cir. 1982). In *N-500L Cases*, the court consolidated twenty-six tort actions and several third-party claims for contribution. Plaintiffs had requested a jury trial in all the cases. Some defendants moved for non-jury trial on their contribution claims and other defendants objected. The court concluded that Rule 38 incorporates a right of reasonable reliance: others are entitled to rely on a jury demand with respect to the issues it covers, but only with respect to those issues. Those who may so rely need not be directly adverse to the jury demanding party; thus, if issues embraced by a jury demand arise between third parties on a cross-claim, the third-parties need not have filed a separate jury demand to be entitled to a jury trial on those issues. Here, defendants' reliance on plaintiffs' jury demand was reasonable with respect to the issues of defendants' tort liability but not with respect to contribu-

Moore's *Federal Practice*.¹¹² In the courts subscribing to this reading of Rule 38(c), a general jury demand would be effective as to issues framed in other components of a consolidation only if the issues in those components were sufficiently similar. (This would be the question only in a court willing to treat the components as a single civil action, of course.) In that circumstance, the parties to those "other" components *could* rely on the initial jury demand but only *insofar as the components shared common fact issues*, and a jury *could* be imposed on parties who would have preferred the court as trier but only *insofar as the components shared common fact issues*. This seems to be a reasonable and indeed desirable system for cases that are going to be tried together. In a single consolidated trial, it would be inefficient and would invite inconsistent results for the same issues to be decided by the court as to some parties, and by a jury as to parties from different components. Yet that would be the outcome if the components were not treated as a single civil action and parties in some components waived their jury trial rights, unless the court could cure the problem through a discretionary grant of jury trial.¹¹³

It similarly makes sense to allow other parties within a consolidation ten days after service of an issue-limited jury demand to serve a demand as to other issues in the consolidation if the issues for which a jury initially was demanded include issues to which the new jury-demander is "connected." Thus, whether a party is entitled to file such a follow-up or responsive jury demand should be a function of his connection to the issues as to which a jury was demanded, rather than a function of the antecedent component in which he was named a party. This resolution is consistent with the policy of Rule 38(c) to allow a party as to whom some issues will be tried to a jury (at the request of another) to elect to have the same trier decide other issues in the action in which he has an interest.

tion issues related to relative fault among the defendants. See, e.g., *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 690 (9th Cir.) (holding that defendants could rely on plaintiff's jury demand and were not obliged to make an independent demand with respect to the issues covered by plaintiff's demand), *cert. denied*, 429 U.S. 940 (1976); *Collins v. Government of Virgin Islands*, 366 F.2d 279, 284 (3d Cir. 1966) (holding that "defendant can rely on the jury demand of a co-defendant to the extent of the issues embraced by that demand"), *cert. denied*, 386 U.S. 958 (1967); *Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Ill. Nat'l Bank & Trust Co.*, 675 F. Supp. 1515, 1517-18 (N.D. Ill. 1987) (holding that where issues between certain defendants and the plaintiff differed from the issues between another defendant and the plaintiff, the first-mentioned defendants' general jury demands did not entitle the plaintiff to a jury trial against the second-mentioned defendant), *aff'd on other grounds*, 858 F.2d 1264 (7th Cir. 1988).

112. See 5 MOORE ET AL., *supra* note 98, ¶ 38.45, at 38-419 n.2.

113. See *infra* text accompanying notes 121-124.

Finally, relying on the same underlying principles, the parties whose consent must be obtained to permit a jury demand to be withdrawn should be all those "connected" to the issues which, but for the proposed withdrawal, would be heard by a jury, without regard to the antecedent component to which they are parties. Absent such an interpretation of the provision guarding against withdrawal, a party might withdraw his jury demand after the time for demanding a jury had expired, and thus deprive other interested parties of a jury trial.¹¹⁴

Employing the implementing principles elaborated above, the consequences of regarding a consolidation as a single civil action for jury demand purposes would not be at all problematic. Indeed, they are far more desirable than the consequences of treating the components of a consolidation as separate and distinct civil actions.

Parties have only occasionally attempted "creative" cross-component arguments concerning jury demands. As a result, relatively little case law addresses the foregoing or related questions. But there is some. A Delaware district court rejected a plaintiff's effort to have his pre-consolidation jury demand in one component cover all the components of an all-purpose consolidation.¹¹⁵ However, it did so in circumstances where the action in which the demand had been made had been dismissed and was on appeal and where, on the grounds that the surviving claims were distinct, the plaintiff had sought (and the court granted) an immediate separate trial. Thus, the remaining trial court proceeding was no longer consolidated with the action in which a timely jury demand had been made.¹¹⁶ It is not clear how the court would have held in different circumstances. The Ninth Circuit has recognized cross-case effectiveness of jury demands, at least with respect to issues that arise in both consolidated cases.¹¹⁷

114. This position, too, is consistent with the law that has developed outside the consolidation context. See 5 MOORE ET AL., *supra* note 98, ¶ 38.45, at 38-419-38-420, 38-423.

115. *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp. 1319 (D. Del. 1985).

116. *Id.* at 1327-28; see also *Pan Am. Corp. v. Delta Air Lines, Inc.*, No. 93 Civ. 7125, 1994 U.S. Dist. LEXIS 5704 (S.D.N.Y. May 2, 1994) (holding that where an adversary proceeding, withdrawn from the bankruptcy court, had been consolidated for trial with other actions, plaintiffs in the adversary proceeding could not rely on the timely jury demands made in the other actions, where the jury demands preceded the consolidation, the claims remained separate, the court had not ordered the complaints to be consolidated, the jury waiver in the adversary proceeding was unambiguous, and, in the interest of fairness and efficiency, the court ordered a separate trial of the adversary proceeding).

117. *United States v. Nordbrock*, 941 F.2d 947, 949 (9th Cir. 1991) (holding that where the court had consolidated for trial government's action for injunction against tax preparer with preparer's action for a refund of penalty and abatement of assessment, and preparer had timely requested jury trial in the refund action and, after the consolidation, had filed a continuing demand for jury trial, the district court erred in holding a bench trial on the issue of willfulness).

As one might expect, courts have held that a plaintiff cannot cure his waiver of a right to jury trial by bringing a second identical suit, demanding a jury trial in it, and then having the two actions consolidated.¹¹⁸ Similarly, in reactive litigation that is consolidated, at least one court has held that consolidation did not cure a waiver of the jury trial right in one of the components. A timely demand made in one of the suits did not support a jury trial in the other, even where the complaint in the second action had been "converted" into a counterclaim.¹¹⁹ Thus, consolidation per se does not necessarily cure a waiver of jury rights. But the waiver or the absence of any right to a jury trial in one action does not preclude parties from making effective jury demands in other components of a consolidation.¹²⁰

Shifting focus from entitlement to a jury to jury trial in the courts' discretion, one finds that exercise of the right to jury trial in one compo-

which was common to both actions); see also *American Standard, Inc. v. Crane Co.*, 60 F.R.D. 35, 42-43 (S.D.N.Y. 1973), *rev'd on other grounds*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975). In *American Standard*, in seeking jury trial on a counterclaim, plaintiff counter-defendant sought to rely on jury demand by a plaintiff in another of the consolidated securities law actions. In view of the consolidation and the other plaintiff's jury demand (among other things), the court ordered a jury trial on defendant's counterclaim/defense/setoff alleging market manipulation.

118. *Vassalos v. Hellenic Lines, Ltd.*, 482 F. Supp. 906, 909 (E.D. Pa. 1979). The motion to consolidate appears to be one of the plaintiff's mistakes. If plaintiff could proceed with the second action and merely dismiss the first, he would accomplish his goal. Of course, the courts might not permit this machination either. See *Walton v. Eaton Corp.*, 563 F.2d 66, 70-74 (3d Cir. 1977) (holding that the right to demand a jury trial in a second action, which duplicated the first except that the latter was not brought as a class action, would not be recognized where the plaintiff waived a jury trial in the first action; here, the trial court consolidated the two suits on its own motion); *McLaughlin v. Blidberg Rothchild Co.*, 163 F. Supp. 33, 35 (S.D.N.Y. 1958) (striking jury demand of plaintiff who had waived right to jury trial in Jones Act suit and sought to postpone her election to sue at law or in admiralty by commencing a second action upon the identical facts).

119. *Vesper Constr. Co. v. Rain for Rent, Inc.*, 602 F.2d 238, 240-41 (10th Cir. 1979). No jury trial demand had been made in "defendant's" action against the original plaintiff and a third party. The actions were consolidated and defendant converted its complaint into a counterclaim. Apparently, the factual issues raised by the counterclaim differed from those raised by the complaint.

120. *Marvel Entertainment Group, Inc. v. Arp Films, Inc.*, 116 F.R.D. 86, 89 (S.D.N.Y. 1987) (noting in dicta that a party's waiver of right to a jury trial in one action would not foreclose the same party's right to a jury in reactive suit with which the former action was consolidated; the pleadings were not merged and whether party demanded jury in one action had "no bearing" on whether it might demand a jury in the other); see *Leimer v. Woods*, 196 F.2d 828, 836 (8th Cir. 1952). In *Leimer*, the court stated in dicta as to consolidation:

[A] federal court may not under the Rules . . . , in a situation of joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, deprive either party of a properly demanded jury trial upon that question, by proceeding to a previous disposition of the equitable cause . . . unless there exist . . . impelling considerations for . . . such a pre-emptive procedural course.

Id.

nent of a consolidation influences how courts exercise their discretion to order a jury trial on issues, in other components, that either carried no right to a jury trial or as to which the parties waived their right.¹²¹ That is to say, courts often exercise their Rule 39 discretion¹²² to order matters tried to a jury that, but for their consolidation with a matter in which jury trial has been demanded, would be tried to a judge. Frequently, in so doing, the courts implicitly treat the consolidation as a single civil action. This enables them to send issues common to legal and equitable or admiralty claims to the jury, pursuant to the *Beacon Theatres*¹²³ line of cases, and to allow jury trial as to other issues, in their discretion. The

121. See, e.g., *Armstrong v. Chambers & Kennedy (In re Dearborn Marine Serv., Inc.)*, 499 F.2d 263, 271 n.14 (5th Cir. 1974) (noting that, with the unification of admiralty and civil procedure, suits in admiralty have been consolidated with actions at law with the effect that issues in the former have been tried to a jury), *cert. dismissed sub nom. Monk v. Chambers & Kennedy*, 423 U.S. 886 (1975); *Blake v. Farrell Lines, Inc.*, 417 F.2d 264, 266 (3d Cir. 1969) (holding that it was within judge's discretion to consolidate two actions, one attended by right to jury trial and the other not, with factual issues in both cases to be tried by jury, where only by decision of common issues of fact by single trier could benefits of consolidation be fully realized); *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673, 675-76 (3d Cir. 1964) (directing district court to consider consolidation of admiralty suit and action at law, and observing that the admiralty libellant might then be required to submit its indemnity claim to a jury), *cert. denied*, 382 U.S. 812 (1965); *Cedars-Sinai Medical Ctr. v. Revlon, Inc.*, 111 F.R.D. 24, 31-32 (D. Del. 1986) (holding that where patent holder made timely jury demand in later filed infringement action but not in another, and his second action was not merely a procedural ploy to gain a jury trial, suits would be consolidated for trial before a single jury where separate trials might violate patent holder's Seventh Amendment right to have single jury decide common factual questions); see also *Parsons Mills, Inc. v. Companhia Portuguesa de Transportes Maritima S.A.R.L.*, 82 F.R.D. 331, 333 (S.D.N.Y. 1978) (following *Blake*); *Butterfield v. Crist*, 52 F.R.D. 489, 490 (E.D. Wis. 1971) (ordering consolidated jury trial where some defendants had waived right to jury trial but another had made timely demand and virtually identical fact issues had to be decided); *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co.*, 312 F. Supp. 380, 381-82 n.1 (E.D. Pa. 1970) (following *Blake*), *rev'd*, 444 F.2d 727 (3d Cir. 1971); *Richland v. Crandall*, 259 F. Supp. 274, 281 (S.D.N.Y. 1966) (holding that where jury demand was timely as to seventeen of twenty defendants and may have been timely as to the others by virtue of presenting additional factual issues, jury trial would be granted as to all, in the court's discretion); cf. *Spiro v. Pennsylvania R. Co.*, 3 F.R.D. 351 (S.D.N.Y. 1942) (in a joinder, not a consolidation, situation, relieving plaintiff of waiver of right to jury trial as to issues peculiar to one defendant where jury trial had been properly demanded with respect to issues common to both defendants).

122. Federal Rule of Civil Procedure 39 provides in pertinent part:

(b) [N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues. (c) . . . In all actions not triable of right by a jury . . . the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

FED. R. CIV. P. 39.

123. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (holding that when the Seventh Amendment right attaches and has been properly demanded, all factual issues raised by the legal aspects of a case must be tried to a jury, and the jury's findings will be binding in the resolution of the non-legal claims).

desirability of the consequences of treating the consolidation as a single civil action is manifest from the courts' widespread adoption of this approach. If the courts were not treating the consolidation as a single civil action, Rule 39(c)¹²⁴ would preclude jury decision of the issues in the actions not triable by jury, when all the parties failed to consent to jury trial.

Changing focus once again within the realm of the interaction between case consolidation and jury trial, one finds that consolidation may indirectly affect litigants' procedural rights through its impact on the fairness of the trial that litigants receive. Just as concerns about prospective prejudice at trial enter into the decision whether to consolidate cases,¹²⁵ concerns about whether a consolidation did prejudice litigants at trial are expressed in decisions on post-trial motions and appeals. Courts reverse judgments because of prejudice they attribute to consolidation for jury trial.¹²⁶ Whether litigants have been prejudiced by a consolidated trial has not been a function of whether the court regarded a consolidation as a single civil action in some abstract sense, however. Indeed, it is difficult to imagine how so regarding the action could be prejudicial. The prejudice, if any, tends to flow from the number of witnesses and pieces of documentary evidence and from the mass of facts and law that sometimes are inherent in a consolidated trial, however the court conceives of a consolidation.

Parties' Seventh Amendment rights¹²⁷ also interact with consolidation in several respects. They may affect the decision whether to consolidate cases.¹²⁸ Secondly, the scope of the Seventh Amendment entitle-

124. See *supra* note 122.

125. See, e.g., *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460-61 (E.D. Mich. 1985) (refusing to consolidate cases alleging injury from an intrauterine device because individual issues would make the trial confusing, unmanageable, and perhaps inequitable).

126. See, e.g., *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (holding that defendant in asbestos litigation was prejudiced by consolidation of forty-eight cases for trial, under the circumstances of the case, in which, *inter alia*, "the maelstrom of facts, figures, and witnesses . . . was likely to lead to jury confusion"); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906-07 (4th Cir. 1983) (holding that consolidation which caused jury to be aware of defendant's insurance coverage and of recoveries by other airplane crash victims prejudiced defendant airline and was reversible error), *cert. denied*, 464 U.S. 1040 (1984); *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1454-56 (S.D. Ala. 1992) (finding that consolidation of ten personal injury and three wrongful death suits involving worker exposure to asbestos confused jury and prejudiced defendant manufacturers, despite use of special measures (notebooks, cautionary instructions, special interrogatory forms) to alleviate risks of prejudice and confusion).

127. See *supra* note 97.

128. Courts may order consolidation so as to vindicate parties' Seventh Amendment rights, see, e.g., *Cedars-Sinai Medical Ctr. v. Revlon, Inc.*, 111 F.R.D. 24, 31-32 (D. Del. 1986), discussed *supra* note 121; they may deny consolidation in order to protect parties' Seventh Amend-

ment sometimes is at issue in consolidated cases. Neither the analyses nor the conclusions seem to be altered by consolidation, however. To determine the issues to which the right attaches, the courts apply the principles of Seventh Amendment jurisprudence as they would in any litigation.¹²⁹ In addition, in consolidated cases among others, parties have argued for a "complexity exception" to the Seventh Amendment.¹³⁰ Because that proposed exception has not been generally accepted by the courts and because it would neither be limited to nor generally applicable to consolidated cases, this Article does not elaborate upon it but merely notes the frequent linkage between the consolidation of cases and the complexity that allegedly threatens the ability of a jury to find the facts.¹³¹

A footnote to this discussion relates to the right of parties to select a presiding officer different than a federal district court judge or a trier of fact different than such a judge or a jury: namely, the right of parties to consent

ment rights, see, e.g., *Thomas v. Peninsular & Oriental Steam Navigation Co.*, 246 F. Supp. 592, 593-94 (E.D. Pa. 1965) (refusing to transfer longshoreman's personal injury action to admiralty for consolidation with separate libels, where effect would be to deny jury trial properly demanded in longshoreman's suit); or they may deny consolidation where some cases in a proposed consolidation will be tried to a jury and others will be tried to the court. See, e.g., *Tucker v. Arthur Anderson & Co.*, 73 F.R.D. 316, 318 (S.D.N.Y. 1976); *Turner v. Transportacion Maritima Mexicana S.A.*, 44 F.R.D. 412, 414-15, 421 (E.D. Pa. 1968). At least one district court rejected the argument that if cases could not have been consolidated at common law, the Seventh Amendment precludes their consolidation, or the consolidation violates the Seventh Amendment. *Cecil v. Missouri Pub. Serv. Corp.*, 28 F. Supp. 649, 650 (W.D. Mo. 1939). Although the considerations that affect the decision whether to consolidate, as distinguished from the effects of consolidation, are beyond the scope of this Article, I note this influence, in passing.

129. E.g., *In re N-500L Cases*, 691 F.2d 15, 19-21 (1st Cir. 1982). If consolidation affects the basis of the court's subject matter jurisdiction, that in turn may influence the issues as to which the Seventh Amendment affords a jury trial. See *Horizon Creditcorp v. Oil Screw "Innovation I"*, 730 F.2d 1389, 1393-94 (11th Cir. 1984) (Clark, J., concurring in part and dissenting in part) (having concluded that consolidation conferred diversity jurisdiction over an action purportedly brought in admiralty, further concluding that trial court erred in failing to afford appellants a jury trial on damages); Steinman, *supra* note 1, at 755-56.

130. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom. Grant v. Union Bank*, 446 U.S. 929 (1980). See generally Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984).

131. Similarly, the question whether, in a bifurcated trial, the Seventh Amendment permits a different jury to determine damages than had found liability often has been raised in consolidated cases, see, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 315 (6th Cir. 1988) (finding no constitutional prohibition against trying issues of causation, liability, and damages before different juries), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 488 U.S. 1006 (1989); *Horizon Creditcorp*, 730 F.2d at 1394 & n.9 (noting courts' struggle with the circumstances under which a second jury can determine damages after another jury has found liability), but the question is neither peculiar to nor characteristic of consolidated cases. With respect to Seventh Amendment objections to polyfurcated trial plans, see generally Linda S. Mullenix, *Beyond Consolidation: Post-aggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 557 (1991).

to the conduct of proceedings and to the entry of judgment by a magistrate judge who has been specially designated to exercise such jurisdiction by the court he or she serves.¹³² When cases have been consolidated, the question arises: Which parties must consent for their consent to be effective?

In *EEOC v. West Louisiana Health Services, Inc.*,¹³³ the Fifth Circuit extended its ostensible practice of regarding consolidated cases as retaining their individual identities for jurisdictional purposes.¹³⁴ It held that a magistrate judge *lacked* jurisdiction to hear a case in which the intervenor, Ms. Lewis (on whose behalf the EEOC had sued), had not consented to trial by the magistrate, but that the magistrate judge *had* jurisdiction to hear the companion case (involving Ms. Anderson) that had been consolidated with the Lewis case for purposes of trial and judgment. Had the court treated the consolidation as a single civil action, it would have held the magistrate judge without jurisdiction to hear either component, in view of Ms. Lewis' refusal to consent. Rather remarkably, in the very same opinion, the court held that Ms. Lewis' notice of appeal was timely only because filed within fourteen days of the filing of Ms. Anderson's timely notice of appeal. That is, it treated the consolidated cases as a single civil action for purposes of Federal Rule of Appellate Procedure 4(a)(3), citing the use of only one docket sheet, the fact that the two cases were treated together from the time of their consolidation, and the single order that decided both cases.¹³⁵ The court insisted that its two holdings were not inconsistent, because the requirements of trial and appellate jurisdiction are not identical.¹³⁶

132. 28 U.S.C. § 636(c) (1988 & Supp. IV 1992).

133. 959 F.2d 1277 (5th Cir. 1992); see also *Lauderdale County Sch. Dist. v. Enterprise Consol. Sch. Dist.*, 24 F.3d 671, 678 (5th Cir.) (noting that all the parties agreed to have the matters tried by a magistrate judge, who consolidated the cases), *cert. denied*, 115 S. Ct. 484 (1994).

134. The Court of Appeals for the Fifth Circuit has not always regarded the case components of consolidations as retaining their individual identities for jurisdictional purposes. See, e.g., *Road Sprinkler Fitters Local Union v. Continental Sprinkler Co.*, 967 F.2d 145, 149-52 (5th Cir. 1992) (denying immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes and the cases could have been filed as a single suit and asserted virtually identical legal theories); *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 280-81 (5th Cir. 1984) (holding that timely filing of motion to amend judgment in only one of the consolidated cases nullified a prior notice of appeal and cross-appeal by a party to all of the consolidated suits, appealing in all of them), *aff'd on other grounds on rehearing en banc*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied sub nom. Southern Pac. Transp. Co. v. Harcon Barge Co.*, 479 U.S. 930 (1986); see also Steinman, *supra* note 1, at 822-23.

135. *EEOC*, 959 F.2d at 1281; see Steinman, *supra* note 1, at 819-20.

136. *EEOC*, 959 F.2d at 1281.

I submit that diametrically opposed conclusions on the two questions needlessly creates uncertainty for litigants. Looked at prospectively, it makes no sense to have a consolidation for all purposes including trial, one component of which will be tried to a magistrate judge and another component of which will be tried to a district judge. Yet, in its effort to preserve the work that had been done by the parties and the magistrate judge, the court of appeals validated just such an absurdity. The better result would have been to accept the sacrifice of resources in this one instance and lay down a sensible rule for the future, namely, that in order for a consolidated case to be adjudicated by a magistrate judge, all the parties to all the components of the consolidation must consent to assignment to the magistrate. For this reason and for the other reasons elaborated in Part I of this Article and above in Part II, the court should have treated the consolidation as a single civil action, for both purposes at issue.

To recapitulate, in determining the time within which parties must make jury demands and in determining which parties must consent to withdrawal of a jury demand, far more desirable outcomes flow from treating consolidated cases as a single civil action than flow from treating the components as separate actions. Existing common law governing the circumstances under which amended pleadings give rise to a right to make a jury demand and denying revival of waived rights would prevent abuse of the right to demand a jury, in the context of consolidated cases. Moreover, much existing case law measures the scope of general jury demands in a manner that produces ideal results for the trial of common issues in consolidated cases treated as a single civil action. Treating consolidations in this manner similarly leads to the most desirable outcomes when the question is who may serve a jury demand in reaction to an issue-limited demand and who must consent to withdrawal of a jury demand. The treatment of consolidated cases as single civil actions can guide the law with respect to these questions at the same time that it enhances the legitimacy of the courts' existing jurisprudence concerning the exercise of discretion in affording jury trial as to issues, in consolidated cases, that otherwise would be heard by the judge. Finally, the courts should allow adjudication by magistrate judges only when all parties to cases consolidated for all purposes or for trial consent to such adjudication. This conclusion follows both from regarding such cases as single civil actions and from the absurdity of so consolidating cases and then allowing some components to be tried by the court while others are tried, in a duplicative proceeding, by a magistrate judge.

C. Recusal

This section of the Article shows that the consolidation of cases expands the scope of the proceedings in which judges' impartiality reasonably may be questioned and in which judges may be required to disqualify themselves on other grounds. As a result, consolidation may entitle parties to recusal of a judge who, but for the consolidation, would be qualified to hear some of the component actions. Moreover, because multi-case discovery often has effects that continue through trial, even "consolidation" only for pretrial may expand the scope of the proceedings in which a judge's impartiality reasonably may be questioned and in which the judge may be required to disqualify herself on other grounds. For the reasons elaborated below, either case law or statutory law should make clear that a judge who would be disqualified from hearing an action should be disqualified from ruling on a motion to consolidate or to sever that action. Finally, litigants should expect the disruption and other costs that attend a change of judge to cause both district court and appellate judges to construe more narrowly, in large and complex cases including multidistrict consolidations, the circumstances in which judges must disqualify themselves.

The disqualification of federal judges and magistrate judges is governed by 28 U.S.C. § 455.¹³⁷ It provides in part:

- (a) Any justice, judge, or magistrate [judge] of the United States shall disqualify himself in *any proceeding* in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning *a party*, or personal knowledge of disputed evidentiary facts concerning *the proceeding*;
 - (2) Where in private practice he served as lawyer *in the matter in controversy*, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning *the matter*, or the judge or such lawyer has been a material witness concerning it;
 - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning *the proceeding* or expressed an opinion concerning the merits of *the particular case in controversy*;

137. 28 U.S.C. § 455 (1988).

- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in *the subject matter in controversy* or in *a party to the proceeding*, or any other interest that could be substantially affected by the outcome of *the proceeding*;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
- (i) Is *a party to the proceeding*, or an officer, director, or trustee of *a party*;
 - (ii) Is acting as a lawyer in *the proceeding*;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of *the proceeding*;
 - (iv) Is to the judge's knowledge likely to be a material witness in *the proceeding*.
- (c)
- (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
- (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
-
- (e) No justice, judge, or magistrate [judge] shall accept from *the parties to the proceeding* a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
- (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate [judge], or bankruptcy judge to whom *a matter* has been assigned would be disqualified, after substantial judicial time has been devoted to *the matter*, because of the appearance or discovery, after *the matter* was assigned to him or her, that he or she [etc.] . . . has a financial interest in *a party* (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, [etc.] . . . , as the case may be, divests himself or herself of the interest that provides the grounds of the disqualification.¹³⁸

I have highlighted language in the statute that could be significant in determining whether, and as to what, a federal judge should disqualify

138. 28 U.S.C. § 455 (1988) (emphasis added).

herself when cases have been consolidated. Thus, if cases have been consolidated, the scope of the proceeding in which the judge's impartiality might reasonably be questioned would be greater than it would be absent consolidation. Similarly, if the entire consolidation is treated as "the proceeding," "the matter in controversy," or "the case," or if the parties to one component are regarded as parties to the entire proceeding, the scope of the litigation that judges should disqualify themselves from hearing will be enlarged.¹³⁹ Parties whose cases otherwise would be heard by a particular judge may find that, because of consolidation, that judge cannot hear their claims. Focusing on an earlier point in the judicial process, a judge may have to deny a motion to consolidate a case that she is hearing with another in which she has recused, or would have to recuse, herself, unless the advantages of the consolidation outweigh the disadvantages of the judge recusing herself.¹⁴⁰

Some case law explores these issues. For example, in *Little Rock School District v. Pulaski County Special School District*,¹⁴¹ the plaintiff district and some intervenors argued that the district judge should have granted their motion for recusal under § 455(b)(2) where, during the trial judge's private law practice, one of his partners had represented parties who participated as amici curiae in *Clark v. Little Rock School District*,¹⁴² an intradistrict segregation case in the county schools. Although that case had been dormant for five years, it formed part of the historical background of the live dispute before the court. Having consolidated all the related cases, the district judge severed *Clark* and returned it to the docket of another judge, to avoid the appearance of impropriety.¹⁴³

Appellants raised the question whether the severance had been an abuse of discretion and whether the consolidation of all the related cases, including *Clark*, required the district judge to recuse himself from the entire litigation. The Eighth Circuit rejected the argument, concluding that the consolidation was not mandatory, but discretionary (no compelling reason

139. See, e.g., *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 250, 254 (D. Minn. 1989) (ordering counsel in multidistrict litigation to submit to the court a list of all companies affiliated with the parties and of all counsel associated with the litigation). Such a procedure is recommended by the MANUAL FOR COMPLEX LITIGATION, *supra* note 14, §§ 20.121, 33.13.

140. See, e.g., *Montague v. Department of Welfare*, No. 87-6118, 1987 U.S. Dist. LEXIS 9907, at *3 (E.D. Pa. Oct. 26, 1987). But see *supra* p. 46, arguing that judges should be disqualified from ruling on a motion to consolidate an action that the judge would be disqualified from hearing.

141. 839 F.2d 1296 (8th Cir.), *cert. denied sub nom. Arkansas State Bd. of Educ. v. Little Rock Sch. Dist.*, 488 U.S. 869 (1988).

142. *Clark v. Board of Dirs.*, 328 F. Supp. 1205 (E.D. Ark. 1971).

143. *Little Rock*, 839 F.2d at 1301.

having been shown why justice required the consolidation), as was the decision to sever, and that the district judge had not abused his discretion in making either decision. "By severing *Clark*, the District Court enabled itself to continue handling the present interdistrict case, thus avoiding the ruinous delay, expense, and confusion that assignment of a new judge would have caused."¹⁴⁴ The Eighth Circuit did not, however, confront whether the district court judge should have disqualified himself from making either the consolidation or the severance decisions. If the involvement of his prior law partner disqualified him from participating as a judge in *Clark*, I should think that it would disqualify him from consolidating that case with others and from severing it from others, whether or not it was appropriate for the cases to be consolidated or severed.¹⁴⁵ The appeals court's decision is wanting in its failure to discuss this question, although that failure may flow from the parties' failure to couch their argument in the appropriate manner, or from the court's opinion that the former partner's activities were not disqualifying even in *Clark* itself.

The Eighth Circuit alluded to the appellants' contention that "the matter in controversy" of which § 455(b)(2) speaks "may extend beyond the litigation conducted under the same docket number where the issues in dispute are sufficiently related."¹⁴⁶ The implication of this contention presumably was that the judge was disqualified from hearing even the consolidated cases other than *Clark*, and perhaps would have been disqualified even if they never had been consolidated with *Clark*. The appeals court assumed *arguendo* that the statutory language might be so construed (although it earlier had held to the contrary),¹⁴⁷ but pointed out that

what kinds of cases are sufficiently related . . . would remain a question of judgment and degree. [The court] cannot say that the trial judge's former law partner's submission of an *amicus* brief in a case involving, to a large extent, different issues and different remedies two decades ago requires recusal under § 455(b)(2), nor [does the court] believe that Congress intended such a result.¹⁴⁸

144. *Id.*

145. According to the opinion in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.* No. 1, 660 F. Supp. 624, 636 (E.D. Ark. 1987), both another judge and the judge whose qualification to hear the case was questioned had signed the consolidation order.

146. *Little Rock*, 839 F.2d at 1302.

147. See *infra* text accompanying notes 149–150.

148. *Little Rock*, 839 F.2d at 1302. Referring to *Johnson v. Manhattan Ry.*, 289 U.S. 479 (1933), the district judge had opined that "the fact that these cases were consolidated for a month in no way taints the remaining consolidated cases even assuming, *arguendo*, that the *amicus curiae* status in *Clark* would require recusal under 28 U.S.C. § 455(b)(2)." *Little Rock Sch.*

The case to which reference was made in *Pulaski County*, as having rejected a construction of the "matter in controversy" language of § 455(b)(2) to require recusal beyond the docket number of a particular case, was *Patterson v. Masem*,¹⁴⁹ a civil rights case that raised a recusal issue concerning the same district judge and the same connection with *Clark*. A teacher had claimed employment discrimination in the school district's failure to promote her, allegedly either because of her race or in retaliation for her exercise of First Amendment rights. Patterson challenged the judge's refusal to recuse himself where his former law firm, during the time of his association with it, had sought to intervene and had participated as an amicus in the *Clark* litigation, litigation which the judge had considered, but decided against, consolidating with Patterson's case. The Eighth Circuit there said, "[I]t follows from the denial of the consolidation motion that the 'matter in controversy' here cannot be the same as in *Clark* and that the statutory language on recusal . . . thus does not apply."¹⁵⁰ As in the *Pulaski County* case, the Eighth Circuit failed to discuss the propriety of this trial judge ruling on the consolidation motion.

More recently, the Sixth Circuit granted a petition for mandamus and ordered a district judge to recuse himself from a series of consolidated actions filed against Aetna Casualty and Surety Company.¹⁵¹ The procedural history is a bit complex; suffice it to say that, after Judge Hull consolidated seven cases upon an uncontested motion and disqualified himself from the cases, and after the chief judge of the circuit had reassigned the cases, Judge Hull denied Aetna's motion to try the seven cases, as consolidated, on the ground that the consolidation was not appropriate, and reassigned three of the cases to himself. He explained that the firm for which his daughter worked was participating in four of the cases but, once he had decided not to try the cases together, he no longer was disqualified from trying the other three.¹⁵² Thereafter, his daughter ceased to work for any

Dist., 660 F. Supp. at 637. In an opinion reaffirmed and supplemented by the one discussed in the text, the Eighth Circuit had said, "[W]e do not think that such a fleeting and tenuous connection between the present case and the judge's partner's activities while in practice years ago, was intended by Congress to require recusal." *In re Little Rock Sch. Dist.*, 833 F.2d 112, 113 (8th Cir. 1987), *reaff'd*, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296 (8th Cir.), *cert. denied sub nom. Arkansas State Bd. of Educ. v. Little Rock Sch. Dist.*, 488 U.S. 869 (1988).

149. 774 F.2d 251 (8th Cir. 1985).

150. *Id.* at 254 n.2. It added that no circumstances had been brought to the court's attention that would cause a reasonable person to question the trial judge's ability to impartially decide Patterson's case. *Id.*

151. *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990).

152. *Id.* at 1137.

firm representing parties in any of the cases. Aetna asserted that Judge Hull was disqualified by § 455(a),(b)(4), and (b)(5)(ii) (concerning the appearance of partiality and conflicts of interest), from ruling on its motion to consolidate for trial and from reassigning some of the cases to himself. It pointed out that each of the seven cases involved virtually identical parties and legal issues and very similar factual issues; that the daughter's former firm actively represented the plaintiff, the FDIC, in four of the seven actions; and that the daughter herself had participated as counsel for the FDIC on at least one occasion in one of the consolidated cases, having appeared and posed questions at a deposition.

The Sixth Circuit concluded that

[a] decision on the merits of any important issue in any of the seven cases . . . could or might constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as a precedent. Thus, even if the Morton firm were . . . counsel of record for FDIC in . . . only some of [the seven cases], and was not of counsel in the three cases reassigned by Judge Hull to himself, we would find that the circumstances would indicate to a reasonable party, such as Aetna, that his partiality might be implicated, and/or that § 455 would apply.

....

[T]he judge who had disqualified himself . . . [because of] his daughter's association with a law firm interested in similar substantial issues of Aetna's liability on a common bond arising out of similar Butcher family activities in different banks taken over by FDIC—suddenly reentered the consolidated cases, although his daughter's association with the firm continued, and decided issues of significant import (severance and pretrial schedules).

There was no justifiable basis . . . for the judge to become involved again in any of the consolidated cases [T]he FDIC-Aetna controversies were properly out of his hands at all times until June 30, 1989, the earliest date when his daughter's association with the Morton firm ended. The entry of the orders by, and as directed by, Judge Hull during April 1989 were therefore improper.¹⁵³

The court refused to vacate the order by which Judge Hull, in October, 1989, reassigned one of the cases to another judge, on the ground that "even a judge who has recused himself ought to be permitted to perform

153. *Id.* at 1143-44.

the duties necessary to transfer the case to another judge.”¹⁵⁴ It also validated his order directing a magistrate judge to set three of the cases for trial, on the ground that the order was merely ministerial. However, it vacated his orders denying the motion for a consolidated trial and granting partial summary judgment to the FDIC, citing the significant risk of undermining public confidence in the judicial process and the risk of injustice to the parties if the orders were to remain intact. The court refused to require retrial of the one of the previously consolidated cases that, in the interim, had been tried by a different judge.¹⁵⁵

In a concurring opinion that represented the majority on the issues it addressed,¹⁵⁶ the Sixth Circuit opined that the resignation of the judge’s daughter from the firm that represented the FDIC did not cure any § 455(b)(5) problem, because “[t]he depositions taken in the consolidated action are a part of the proceedings in each case even when the cases are no longer consolidated. A party should not be required to object to questions in depositions asked by members of the judge’s family.”¹⁵⁷ Thus, the consolidation, even if for pretrial only, had necessarily and permanently entangled certain aspects of all the cases.¹⁵⁸ Moreover, the “cure” provisions of § 455(f) were inapplicable.

This case illustrates how consolidation can expand the scope of the litigation from which a judge must recuse himself. Had it not been for the consolidation, Judge Hull presumably would have been able to adjudicate those cases in which his daughter’s firm was not involved.¹⁵⁹ It also illus-

154. *Id.* at 1145.

155. *Id.* at 1145–46. Although petitioners complained that Judge Hull had participated in a discussion with other judges that led to reinstatement of the trial date in that case, the court refused to vacate that reinstatement order because it viewed retrial as penalizing the parties and unjust, and because petitioner had failed to make a § 455(a) claim of bias against the judge who had entered the reinstatement order. *Id.* at 1146.

156. *See id.* (Kennedy, J., concurring).

157. *Id.* at 1147.

158. *Id.* at 1146–47.

159. The possibility of collateral estoppel or stare decisis effects on cases from which a judge would have to recuse himself apparently does not require a judge’s disqualification from a case that, in and of itself, the judge is qualified to hear. I found no cases indicating otherwise. *Cf.* *Perkins v. Spivey*, 911 F.2d 22, 33–34 (8th Cir. 1990). In *Perkins*, the court held that the district court judge did not abuse his discretion in refusing to recuse himself on the basis of preliminary merger discussions between the firm representing defendant and the firm in which his wife was a partner where, *inter alia*, the discussions did not begin until after the judge had ruled for defendant. Although the precise wording of the factual findings and conclusions of law had not yet been determined, any disqualifying circumstances would not have affected the case—between the present plaintiff and an employee of the present defendant—in which those findings might be given collateral estoppel effect, because the employee was not represented by either of the law firms that had discussed merging.

trates that even when cases have been consolidated only for pretrial, the multi-case discovery that is done may require a broader recusal than, and an interpretation of "the proceeding" that goes even beyond the consequences of, my proposal to regard consolidations for all purposes or for trial as single civil actions.

In *Potashnick v. Port City Construction Co.*,¹⁶⁰ the Fifth Circuit manifested a reluctance (similar to that of the *Aetna* court's) to disqualify a judge for purposes of certain consolidated cases that already had been tried, where circumstances unrelated to those particular cases had required the disqualification and where the parties did not claim any actual bias or prejudice. Two suits had been consolidated for trial. Certain parties argued that the judge should have disqualified himself for a variety of reasons: the judge was so connected with the law firm of the primary plaintiff (Potashnick) and with its chief trial counsel (with whom he had business dealings and investments) that his impartiality might reasonably be questioned; the judge himself was represented in other matters by that same firm and counsel; and the judge's father was a partner in that firm.¹⁶¹ The appellate court agreed that the judge's relationship with the primary plaintiff's firm and its chief trial counsel were such that the judge's impartiality might reasonably be questioned, even if no formal attorney-client relationship existed between them.¹⁶² Similarly, although the judge's father was not acting as a lawyer in the proceeding, "when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm,"¹⁶³ so as to require disqualification of the judge. Moreover, the latter ground for disqualification was not waivable and the former had not effectively been waived in light of the judge's failure to reveal the nature of his relationship with the chief trial counsel.¹⁶⁴ Consequently, a new trial before a different judge was required in the *Potashnick* action.

The court also concluded, however, that its reversal would not extend to the exoneration action that had been consolidated for trial with Potashnick's suit. U.S.F. & G. sought exoneration from liability on labor and

160. 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

161. *Id.* at 1106, 1110-14.

162. *Id.* at 1111. The judge apparently had offered to recuse himself, but had not done so because the parties had refused his offers. *Id.* at 1112.

163. *Id.* at 1113. The court added that "the statute requires automatic disqualification when the judge in a proceeding knows of his relative's interest, and the outcome of the proceeding may potentially affect that interest." *Id.* at 1114.

164. *Id.* at 1114-15.

material bonds it had entered into as surety for Port City on its contracts with general contractor Potashnick. By the time of trial, the only claims that remained in the exoneration suit were by a supplier/subcontractor, Brunson, who sought to recover payment for the work he had performed. The trial court had entered judgment in his favor. Potashnick and his surety were not parties to those claims and, since the judge's disqualification stemmed from his relationship to Potashnick's counsel, the appeals court decided that the judgment for Brunson need not be reversed. It is noteworthy, however, that in affirming Brunson's judgment, the court decided U.S.F. & G.'s liability for certain "clay blanket" construction, a matter that also was in controversy in the main lawsuit. The Fifth Circuit observed that "[a]bsent exceptional circumstances, our decision on this specific issue becomes the law of the case in any subsequent retrial."¹⁶⁵ The court of appeals thus allowed a decision made in the first instance by the judge disqualified in the *Potashnick* case to determine an issue in the *Potashnick* case. Despite this, the court did not want to impose another lengthy trial on a peripheral party (Brunson), and it apparently did not believe that this outcome prejudiced the parties, risked undermining public confidence in the judicial process, or violated the disqualification statute. For apparent reasons, that decision is questionable,¹⁶⁶ although one certainly can empathize with Brunson and with the court's desire not to duplicate proceedings unnecessarily.

Finally, one finds that in construing the disqualification statute, particularly "soft" standards such as whether a judge has an interest in the matter in controversy that could be "substantially affected" by the outcome of the proceeding, courts may take into account the costs of disqualification. In *In re New Mexico Natural Gas Antitrust Litigation*,¹⁶⁷ for example, the Court of Appeals for the Tenth Circuit noted that if any judge in the district were disqualified, all would be. This was a multidistrict case assigned to New Mexico as the preferred forum, and reassignment of the case, the court found, would have caused great inconvenience to the parties, counsel, and the new judge. This reasoning contributed to the conclusion that the trial judge had erred in recusing himself as a matter of law.¹⁶⁸ While courts may take costs of disqualification into account in any case, the dis-

165. *Id.* at 1116-17. See generally Steinman, *supra* note 77; *infra* text accompanying notes 169-188.

166. Cf. *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992) (holding that when recusal is appropriate, judge has no discretion to recuse by subject matter or only as to certain issues and not others; recusal must be from whole proceeding).

167. 620 F.2d 794 (10th Cir. 1980).

168. *Id.* at 797.

ruption attendant upon disqualification in a multidistrict consolidation may be greater than normal. As a result, the multidistrict consolidation of cases for pretrial purposes may influence disqualification decisions.

In summary, the consolidation of cases expands the scope of the proceedings in which judges' impartiality reasonably may be questioned and in which judges may be required to disqualify themselves on other grounds. As a result, consolidation may entitle parties to recusal of a judge who, but for the consolidation, would be qualified to hear some of the component actions. Moreover, either case law or statutory law should make clear that a judge who would be disqualified from hearing an action should be disqualified from ruling on a motion to consolidate or to sever that action. Because multi-case discovery often has effects that continue through trial, "consolidation" for pretrial also may expand the scope of the proceedings in which a judge's impartiality reasonably may be questioned and in which the judge may be required to disqualify herself on other grounds. Finally, the disruption and other costs that attend a change of judge may cause both district and appellate courts to construe the circumstances in which a judge must disqualify herself more narrowly in large and complex cases, including multidistrict consolidations, than in other cases.

D. Rulings and Judgments: Law of the Case, Res Judicata and Collateral Estoppel, Direct and Collateral Attacks

1. Law of the Case

"Law of the case" is a concept that discourages the relitigation of issues within the context of a single case. It reflects and derives from a combination of policies, goals, and needs: the policies to avoid duplication of effort and to discourage judge-shopping; the goal of consistency in judicial decisions; and the need to decide some issues before others so that, by cumulative rulings, the court can build toward final judgment. Although akin to the doctrine of collateral estoppel, law of the case is far more flexible, given the policies that support courts' power to reconsider their rulings before they enter final judgment.¹⁶⁹ Rule 54(b) of the Federal Rules of Civil Procedure provides that all decisions are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."¹⁷⁰ This provision is supported by the primary

169. For a recent judicial discussion of the nature of the doctrine, see *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1582 (Fed. Cir. 1994).

170. FED. R. CIV. P. 54(b).

value of having trial courts decide correctly and wisely, thereby better serving the ends of justice, as well as by the practical efficiency gained through avoidance of appellate reversals and retrials. Thus, "[w]hen reconsideration is particularly likely to correct an erroneous ruling or to lead to a manifestly more just decision, the policies supporting law of the case preclusion are outweighed, and generally recognized exceptions to the doctrine are born."¹⁷¹ The courts have created a variety of exceptions to the "rule," and recognize a number of variables that temper the rigor with which they apply the doctrine.¹⁷²

Moreover, law of the case actually is not a single strand, but a multifaceted doctrine. The facet that is most relevant for purposes of this Article is that which operates when a trial court has ruled on a matter and the same legal question is raised a second time during the pendency of the trial court proceedings.¹⁷³

When cases are consolidated, a number of complications may arise in applying law of the case doctrine. An initial question may be whether the above described strand of the doctrine is even applicable or whether a case has progressed beyond trial court proceedings. The very language of Rule 54(b) quoted above raises questions as to which claims, rights, liabilities, and parties it encompasses in describing the decisions that are subject to revision by the trial court judge. If a consolidation is treated as a single civil action, the rulings in any component will remain subject to revision while decisions are made in other component actions, until a final judgment is entered that governs the entire consolidation or until a Rule 54(b) certification is entered with respect to the component in which a ruling was made.¹⁷⁴ Law of the case doctrine, but only it, not *res judicata* or collateral estoppel, will constrain trial court reconsideration. On the other hand, if a consolidation is treated as a collection of separate civil actions, courts will enter judgment in a component without regard to whether claims remain unresolved in other components of the consolidation. The more stringent doctrines of *res judicata* and collateral estoppel will preclude

171. Steinman, *supra* note 77, at 605.

172. For a more detailed discussion of the doctrine, an elaboration of the policies that underlie it, of the exceptions and the variables that affect its application and of the policies that undergird them, see generally *id.* at 597-613.

173. The other facets, as identified by Professor Allan Vestal, arise when an appellate court rules on a matter and the same legal question is raised in the trial court after remand for further proceedings, and when an appellate court rules on a matter and the same legal question is raised in the same appellate court when the case is appealed a second time. Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 4.

174. See Steinman, *supra* note 1, at 794, 798-99.

relitigation of the issues decided in the component case that has gone to judgment.¹⁷⁵

Neither of these alternative approaches, in and of itself, is necessarily better or worse than the other. We should recognize, however, that each position is implied by, or is a consequence of, a different one of the alternative ways courts treat consolidations for appeals purposes. For reasons elaborated in Part I of this Article, I favor treating consolidations as single civil actions and allowing the entry of final judgments in fewer than all the component cases, and the immediate appeal of those judgments, *only* in the courts' discretion, under Rule 54(b), but not as the norm.¹⁷⁶ In such a regime, law of the case doctrine remains operative until the entry of Rule 54(b) certification in the component in which a ruling has been entered or until entry of a final judgment disposing of an entire consolidation. Consolidation that creates a single civil action thus affects litigants' procedural rights by extending the time during which law of the case operates, and by postponing the time at which res judicata and collateral estoppel come to govern.

Assuming that law of the case operates (either because a court subscribes to the view just urged and it has not yet entered an all-encompassing final judgment or because the component case in which a ruling was made remains unresolved at the trial level), the strength of the protection afforded by that doctrine is diminished, at least with respect to pre-consolidation rulings, once a case has been consolidated with others. Indeed, its protections are attenuated even when a case has been "consolidated" with others for pretrial purposes only.

Consider the situation in which reconsideration of a ruling is sought from the same judge who originally rendered it, in the district and division where a case has remained pending, but where the case has, since the ruling, been consolidated with other cases. Whether or not the ruling in question conflicts with rulings previously made in other of the consolidated cases, parties may seek reconsideration of the ruling within the context of its case of origin or may seek to extend the ruling to others among the consolidated cases.

When reconsideration within the "case of origin" is involved and a change of ruling would not affect the other consolidated actions, as when the ruling in question relates solely to legal or factual matters

175. This is not to say, however, that if a consolidation is treated as a collection of separate civil actions, the consolidation has no impact whatsoever on the application of law of the case doctrine. The influence of consolidation is discussed *infra* text accompanying notes 177-188.

176. See Steinman, *supra* note 1, at 796-807.

not common to the consolidated cases, consolidation does not affect the law of the case problem. Reconsideration should be decided according to ordinary law of the case principles, uncomplicated by other factors. By contrast, when effects on the other consolidated actions are likely, the propriety and wisdom of adhering to a prior ruling within the "case of origin" must be evaluated by reference to matters beyond those at the core of law of the case doctrine. Similarly, when litigants raise questions about the binding effect of a ruling beyond its "case of origin," that is, on the other consolidated actions, additional considerations must be addressed.¹⁷⁷

In evaluating adherence to a prior ruling, courts should apply or modify law of the case principles to reflect the need for horizontal consistency among consolidated cases, since uniformity is critical to the efficiency that consolidation is designed to foster. In addition, courts should apply law of the case principles in light of the recognition that what may have been best for one case may not be optimal or even acceptable treatment of the consolidated cases as an aggregate.¹⁷⁸ Consequently, parties to cases that come to be part of a consolidation should recognize that law of the case doctrine is less likely to protect them from reconsideration of prior rulings and from changes in prior rulings than it is to protect litigants in stand-alone litigation. Their expectations of the doctrine should change because

the inefficiencies of reconsideration should be shouldered . . . when warranted by the gain in time, effort, and justice obtained from imposing uniformity in the adjudication of consolidated cases. Furthermore, alteration of pre-consolidation decisions does not necessarily demonstrate vacillation or inconsistency in the law, for the consolidated cases may present a mix of law or fact that is new and different in relevant respects from the mix presented by any one particular component of the consolidation.¹⁷⁹

At the same time, although I have argued throughout this Article that consolidations should be treated as single civil actions, I would not afford retroactive effect to that unity in a manner that would render rulings in one case also rulings "in" actions that had not, at the time of the ruling, been consolidated with the action in which the court ruled. On this view, a

177. Steinman, *supra* note 77, at 623.

178. *See id.* at 625.

179. *Id.* at 625-26.

request for a ruling on the same legal issue in a different component of the consolidation does not trigger law of the case principles.¹⁸⁰

[A] contrary answer could raise a substantial constitutional problem. Parties to the other consolidated actions who are neither parties nor in privity with parties to the 'case of origin' did not have their day in court, their opportunity to be heard before the initial ruling was rendered. If, through consolidation, an adverse ruling automatically became the law in their cases and law of the case doctrine were held to preclude reconsideration, these litigants' due process rights would be infringed.¹⁸¹

180. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (holding that appellate court's prior decision, on interlocutory appeal, was law of the case on whether court could assert in personam jurisdiction over a particular defendant in one component of a multi-district consolidation; it was not law of the case in a different component action, although the prior opinion had strong precedential value therein); *MacDonald v. Follett*, 193 S.W.2d 287, 287-88 (Tex. Civ. App. 1946) (holding judgment of state supreme court on a prior appeal in one of two suits consolidated for trial to be law of the case on only that branch of the consolidated suit). But see *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 175 (C.D. Cal. 1976) (stating that any ruling with regard to the consolidated complaint "will be followed if similar issues are raised by 'tag-along' actions or actions not integrated with the consolidated actions").

181. Steinman, *supra* note 77, at 623-24. The footnote to this text included the following citations:

[Cf.] *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 337-39 (5th Cir. 1982) (defendant asbestos manufacturers in consolidated litigation who were not parties to prior asbestos litigation in which other plaintiffs prevailed, could not be collaterally estopped by determinations made in that prior litigation, even though other defendant manufacturers in the consolidated cases had been parties to the prior litigation); *Capital Investors Co. v. Estate of Morrison*, 584 F.2d 652, 654 (4th Cir. 1978) (decision imposing a constructive trust on promissory notes was held binding, under law of the case, against persons who had intervened after decision was made, but only after they had been given the opportunity to relitigate the issue and had failed to produce any new evidence), *cert. denied*, 440 U.S. 981 (1979). The dissent in the *Capital Investors* case argued that the district judge had acted properly in reconsidering the evidence because there were new parties in the case, and further, that the appellate court erred in effectively shifting to the newcomers the burden of proving incorrect the previous fact findings in a case to which they were not parties. *Id.* at 657-58. 'I do not think previous fact finding can bind a person who is not a party to the case to his detriment . . . absent at the very least a complete reconsideration of the record as a whole plus the opportunity to present evidence . . . ' *Id.* at 658 (Widener, J., dissenting).

Id. at 624 n.86. However, courts handling multidistrict litigation commonly hold that, to further the purposes of the consolidation, "tag-along" cases, transferred by the Judicial Panel on Multi-district Litigation after the original transfer, are "subject to" the pretrial rulings of the transferee court, whether theretofore or thereafter entered. See, e.g., *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1505, 1534-35 (D. Colo. 1989), *rev'd on other grounds sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992).

Consolidation of cases often is accompanied by a change of judge for some of the consolidated cases and often is preceded by an inter-district transfer of some of the cases. Both of these procedural changes may affect law of the case analysis, as well.¹⁸²

When transfer and "consolidation" or coordination is ordered for pretrial purposes only, pursuant to the multidistrict litigation statute,¹⁸³ the temporary unified treatment given to the cases should not, in my view, cause them to be treated as a single civil action for most purposes, including law of the case doctrine.¹⁸⁴ Clearly, section 1407 consolidation does not render rulings made in one case (before the multidistricting or before a case has become part of the multidistrict litigation) rulings in the other consolidated actions. Rulings entered after the consolidation may, of course, simultaneously be rulings in each of the cases. But when, after "consolidation," parties ask the court to reconsider an issue within its case of origin, the unique nature of the consolidation must have an impact on the way the court approaches this request, if law of the case doctrine is not to interfere with the purposes of the pretrial consolidation. Similarly, if after "consolidation" parties ask the court to extend a ruling to others of the consolidated cases, the court's decision should reflect its views of the fairness and administrability of its decision within the consolidated cases collectively. I have explored this matter in detail elsewhere, and refer the reader there.¹⁸⁵ One implication of that discussion is that parties to cases that come to be part of a multidistrict consolidated litigation should recognize that law of the case doctrine is less likely to protect them from reconsideration of pre-consolidation rulings and from changes in such prior rulings than it is to protect parties to stand-alone litigation, particularly when transferor court rulings are questioned in the section 1407 transferee court. Parties' expectations of the doctrine therefore should change. The interaction among the policies that support multidistrict litigation and those that support law of the case doctrine varies, however, with the particular context. Parties may seek reconsideration of commencement court rulings¹⁸⁶ by the Judicial Panel on Multidistrict Litigation (the Panel); of Panel rulings by the Panel itself; of transferor court rulings by the section 1407 transferee court; of transferor and section 1407 transferee court rulings

182. The influences of a change in judge and of transfer, with possible choice of law implications, are discussed in Steinman, *supra* note 77, at 618-622, 626-62.

183. 28 U.S.C. § 1407 (1993).

184. See Steinman, *supra* note 1, at 787-89. Pretrial consolidation may have an impact on recusal issues, however. See *supra* text accompanying notes 151-159.

185. Steinman, *supra* note 77, at 662-706.

186. That is, of rulings by the court in which an action was commenced.

by discovery courts;¹⁸⁷ of discovery court rulings by the section 1407 transferee or other subsequently involved courts; of section 1407 transferee court rulings by that same court; of section 1407 transferee court rulings by the Panel; of section 1407 transferee court and discovery court rulings by remand courts; and of transferor court, section 1407 transferee court, and discovery court rulings by ultimate transferee courts. The importance of adhering to earlier rulings, in promoting the goals of the multidistrict consolidation, will vary depending on the context.¹⁸⁸

Litigants do not have a vested right to favorable trial court rulings, or to trial court refusals to reconsider such rulings. Insofar as one might say that litigants have a right to the protection of law of the case doctrine, discretionary and subject to exceptions though it is, this portion of the Article has sought to explain why the strength of that protection is diminished, at least with respect to pre-consolidation rulings, once a case has been consolidated with others, even when a case has been "consolidated" with others for pretrial purposes only. The adjustments that courts make in applying law of the case doctrine constitute another respect in which consolidation, and temporary combinations akin to it, alter the procedural rights of litigants. Consolidation as I use the term (that is, consolidation for all purposes or for trial), which creates a single civil action, also affects litigants' procedural rights by extending the time during which law of the case operates, and by postponing the time at which res judicata and collateral estoppel come to govern.

2. Res Judicata and Collateral Estoppel¹⁸⁹

When a court has entered a valid, final judgment on the merits, res judicata (claim preclusion) precludes subsequent suits on the same cause of action, preventing relitigation not only of every ground of recovery or defense that the parties actually litigated, but also of every ground or de-

187. That is, by other district courts in which some discovery is proceeding.

188. See Steinman, *supra* note 77, at 671-705.

189. Courts sometimes say that res judicata and collateral estoppel are issues of substantive law, requiring a federal court to apply state preclusion doctrine to state law claims. See, e.g., *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994). However, it is the full faith and credit statute, 28 U.S.C. § 1738 (1988), rather than principles derived from *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), that requires federal courts to treat the judgments of state courts with the same respect that those judgments would receive in the judgment rendering courts. See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 14.15, at 694-97 (2d ed. 1993). That claim and issue preclusion generally are considered matters of procedure (thus, within the scope of this Article) is, *inter alia*, evidenced by their treatment in basic civil procedure courses and hornbooks.

fense that they might have presented.¹⁹⁰ Because *res judicata* is predicated on a final judgment, whether it will apply when a court has resolved all the claims in a case component of a consolidation will depend on whether the court will immediately thereupon enter a final judgment or whether it will delay entry of a final judgment until after it has resolved all the claims in all components of the consolidation.¹⁹¹ As noted above, until a court enters a final judgment, it is relatively free to alter its interlocutory rulings, subject only to the constraints of law of the case doctrine. Case consolidation otherwise should have no effect on the operation of *res judicata*, except insofar as it may influence whom the court regards as being parties before the court.¹⁹² Uncertainty as to which parties (whose claims) are before the court may arise from the court having ordered, or the parties having agreed to, a trial of the claims of fewer than all of the parties to the consolidation.¹⁹³ Consolidation itself will not deprive a party of his day in court: a possible *res judicata* bar of one component case will not apply to other component cases involving different parties.¹⁹⁴ It should be noted that since *res judicata* operates on claims, not on civil actions, this result would not change if a consolidation were viewed as a single civil action.

Historically, the courts have been flexible in determining how many judgments to render in consolidated cases, and when to render them. Thus, in 1908, the Court of Appeals for the Sixth Circuit, interpreting the predecessor to Rule 42 found in Section 921 of the Revised Statutes,¹⁹⁵ wrote,

190. See, e.g., FRIEDENTHAL ET AL., *supra* note 189, §§ 14.3–14.4, 14.7.

191. See Steinman, *supra* note 1, at 794–95. Insofar as *res judicata* is predicated on a *valid* judgment, the doctrine also implicates the rendering court's personal jurisdiction over the parties and its subject matter jurisdiction over the case. For discussion of whether and how these matters may be influenced by a case consolidation, see *id.* at 750–61, 779–82.

192. See, e.g., *In re Air Crash Disaster at Stapleton Int'l Airport*, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1505, 1511–12 (D. Colo. 1989), *rev'd on other grounds sub nom.* Johnson v. Continental Airlines Corp., 964 F.2d 1059 (10th Cir. 1992) (holding certain plaintiffs represented by lead trial counsel in the exemplar trial, in which multiple plaintiffs' claims were fully and fairly litigated, to have formally confessed consolidation and to be precluded from relitigating their claims).

193. See *id.* For example, the court conducted an exemplar trial of the claims of two plaintiffs. Pursuant to the trial plan, plaintiffs and defendants in all cases pending in the district prior to a specified date were bound to the verdict returned in the exemplar trial. *Id.* at 1511. The court also held the plaintiffs in two additional cases to be bound. Otherwise, the claims of the parties to cases filed or transferred after the specified date were not precluded. *Id.*

194. *Thomas v. Pate*, 493 F.2d 151, 159 (7th Cir.), *vacated on other grounds sub nom.* Cannon v. Thomas, 419 U.S. 813 (1974).

195. U.S. REV. STAT. § 921 (1874 & Supp. 1901).

Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly.¹⁹⁶

In modern times, courts often enter separate judgments or say that Rule 42 requires the entry of a separate judgment as to each component case in a consolidation.¹⁹⁷ They also may hold that, when separate cases are consolidated for trial, the verdicts need not be consistent.¹⁹⁸ Particularly when the components are not simultaneously resolved, however, many courts postpone the entry of any judgment until all components of the consolidation have been completely resolved. In this way, they avoid piecemeal appeals,¹⁹⁹ but they also postpone the time at which *res judicata* will be available as a defense to claims that were asserted in some of the component actions.

196. *United States v. Baltimore & O.S.W.R.R.*, 159 F. 33, 35 (6th Cir. 1908), *modified on other grounds*, 220 U.S. 94 (1911); *accord* *Redmond v. Buckeye Cotton Oil Co.*, 277 F. 780, 782 (5th Cir. 1921) (affirming entry of one judgment where consent order consolidating two cases expressly provided that the final decree should be entered in equity and would include the claims made in the action at law).

197. See, e.g., *Horizon Creditcorp v. Oil Screw "Innovation I"*, 730 F.2d 1389, 1390, 1392 (11th Cir. 1984) (entering separate judgments); *Miller v. United States Postal Serv.*, 729 F.2d 1033, 1036 (5th Cir. 1984) (stating the principle); *Oelze v. Commissioner*, 723 F.2d 1162, 1163 (5th Cir. 1983) (rejecting the argument that the tax court had erred in entering separate judgments in consolidated cases against spouses; discussed in Steinman, *supra* note 1, at 828-29); *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 n.5 (M.D.N.C. 1988) (stating the principle in dicta); *United States ex rel. Tennessee Valley Auth. v. Easement & Right-of-Way Over 1.8 Acres of Land*, 682 F. Supp. 353, 355 (M.D. Tenn. 1988) (stating the principle in dicta); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740 (S.D.N.Y. 1988) (entering separate judgments in actions consolidated for trial); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 581-82 (D. Minn. 1968) (in consolidating actions for pretrial and trial, informing parties that court expected to enter separate judgments, although noting that "true consolidation" results in but one judgment). But see *Lauderdale County Sch. Dist. v. Enterprise Consolidated Sch. Dist.*, 24 F.3d 671, 680 (5th Cir.) (entering one judgment that disposed of all claims of all parties, the appellate court finding that the cases were consolidated for purposes of trial and final judgment), *cert. denied*, 115 S. Ct. 484 (1994).

198. See *Cypert v. Baker*, 399 F.2d 927, 929 (10th Cir. 1968) (stating in dicta that in consolidated cases, different verdicts on liability are not considered to be inconsistent); *Koenig v. Frank's Plastering Co.*, 227 F. Supp. 849, 852 (D. Neb. 1964) (same), *aff'd*, 341 F.2d 257 (8th Cir. 1965); *Stephenson v. Steinhauer*, 188 F.2d 432, 436 (8th Cir. 1951) (same).

199. See Steinman, *supra* note 1, at 794, 798-807.

Collateral estoppel (issue preclusion), generally speaking, precludes relitigation of issues actually litigated and decided in a prior action and necessary to the prior judgment.²⁰⁰ Insofar as that description is accurate, what was said above with respect to the influence of the time of entry of a final judgment on the applicability of *res judicata* applies as well to collateral estoppel. However, "interlocutory orders that include findings on specific issues may be given collateral estoppel effect,"²⁰¹ notwithstanding the absence of a final judgment. When that doctrine applies, whether the court has entered a final judgment will not matter, and consequently whether the court will immediately enter a final judgment when it has resolved all the claims in a component or will wait until after it has resolved all the claims in all components will not matter to the applicability of collateral estoppel. With respect to the other linchpins of the doctrine—who actually litigated particular issues—whether a court consolidated some civil actions with others should have no effect on the operation of collateral estoppel, except insofar as it may influence whom the court views as being parties before the court.²⁰²

Consolidation also may influence the courts' evaluations of the equities to be considered when the issue is whether offensive nonmutual collateral

200. See, e.g., *FRIEDENTHAL ET AL.*, *supra* note 189, §§ 14.9–14.11. Under direct estoppel, issues actually litigated and necessarily determined in support of a judgment that is not "on the merits" are binding in subsequent suits on the same cause of action. Both *res judicata* and the collateral and direct estoppel doctrines bind those who were parties and those "in privity with" the parties to the earlier litigation.

201. *Id.* § 14.9, at 660 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. g (1982)); Joseph Shemaria, Comment, *Res Judicata and the Bifurcated Negligence Trial*, 16 UCLA L. REV. 203 (1968).

202. See, e.g., *Humphreys v. Tann*, 487 F.2d 666, 671 (6th Cir. 1973); *Zdanok v. Glidden Co.*, 327 F.2d 944, 953–56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). In *Zdanok*, the appellate court had held that a collective bargaining agreement had been breached by the defendant in *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1962), a case consolidated for trial, after remand, with a second case. On a second appeal, the court not only adhered to its construction of the contract as law of the case in *Zdanok*, but also held the defendant collaterally estopped from introducing new evidence on the issue of liability in the second case. See also *In re Bendectin Prods. Liab. Litig.*, 732 F. Supp. 744, 747–48 (E.D. Mich. 1990) (holding that plaintiffs who opted out of consolidated multidistrict trial would not be barred by collateral estoppel despite similarity of their interests with and other connections to parties who were bound); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1505 (D. Colo. 1989), *rev'd on other grounds sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992); *In re Nissan Motor Corp. Antitrust Litig.*, 471 F. Supp. 754, 758–60 (S.D. Fla. 1979) (holding that remaining plaintiffs in multidistrict litigation would not be collaterally estopped by findings adverse to plaintiffs in another of the consolidated cases, where the court rejected the argument that a likeness in complaint, closely coordinated pretrial responsibilities, and joint motions and strategies justified collateral estoppel).

estoppel should be invoked against a party.²⁰³ Moreover, as a practical matter, the parties to consolidated cases (more than others) may *agree* to be bound by the outcome of certain component actions that proceed as “test” or “exemplar” cases. In those circumstances, persons who otherwise would not be bound will be bound by virtue of their agreement.²⁰⁴ Consolidation itself will not deprive a party of his day in court, however. Collateral estoppel of issues in one component case will not preclude the litigation of the same issues in other component actions, to the detriment of different parties, for example.²⁰⁵ Collateral estoppel of some parties may prejudice others, however, and may justify either the denial of consolidation to begin

203. Under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), courts are to consider such matters as whether the “subsequent” litigation was foreseeable at the time of the first suit so that the defendant had every incentive to defend that action vigorously and whether the nonparty could have joined the prior litigation. In the context of consolidated cases, one or more of which are selected as test cases, the plaintiffs in the other cases are not playing a “wait-and-see” game that might disqualify them from receiving the benefits of offensive nonmutual collateral estoppel and the other litigation is clearly foreseeable to the defendant. See, e.g., *Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. at 1523. There, the court held that plaintiffs in cases “consolidated for resolution through the exemplar trial or confession of the parties” were bound by the result, while plaintiffs with cases in § 1407 consolidation but not consolidated for trial would neither be afforded the benefits, nor suffer the detriments, of collateral estoppel on issues adjudicated in the exemplar trial. Since the latter could have joined the consolidated trial, “justice, fairness and equity weigh[ed] against permitting ‘wait and see’ plaintiffs to assert non-mutual offensive collateral estoppel.” See also *In re Yarn Processing Patent Validity Litig.*, 472 F. Supp. 174, 177 (S.D. Fla. 1979) (stating that § 1407 transferee court could prohibit defendants in multidistrict litigation from asserting collateral estoppel upon remand to transferor court, to avoid allowing them to reap the benefits of a favorable determination in the trial against other defendants while escaping the binding effect of an unfavorable determination). The case is defended in Alan J. Statman, *The Defensive Use of Collateral Estoppel in Multidistrict Litigation After Parklane*, 83 DICK. L. REV. 469, 484–85 & nn.100 & 103 (1979); its potential for abuse is noted in 15 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3866, at 623 (2d ed. 1986) and in *Sentner v. Amtrak*, 540 F. Supp. 557, 558 n.3 (D.N.J. 1982) (the § 1407 court concluding that, as to plaintiffs not parties to its instant interlocutory ruling but in the § 1407 litigation, the common government defendant would be collaterally estopped from relitigating the identical issue upon remand to transferor courts).

204. See, e.g., *Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. at 1505, 1511, 1515 (holding parties to cases consolidated for resolution through an exemplar trial bound by the results of the trial, but that all claims and defenses remained at issue in cases filed or transferred for consolidation after a specified date); cf. *Humphreys v. Tann*, 487 F.2d 666, 671 (6th Cir. 1973) (holding that plaintiffs in multidistrict litigation could not be collaterally estopped from proving defendant’s negligence by virtue of a decision in defendant’s favor in a case arising out of the same occurrence, but brought by other plaintiffs and not part of the consolidation nor made a test case by agreement of the parties), cert. denied, 416 U.S. 956 (1974).

205. *Thomas v. Pate*, 493 F.2d 151, 159 (7th Cir.), vacated on other grounds sub nom. *Cannon v. Thomas*, 419 U.S. 813 (1974).

with or the grant of severance for trial.²⁰⁶ It should be noted that since collateral estoppel operates on issues, not on civil actions, the results would not change if a consolidation were viewed as a single civil action.

To summarize, then, consolidation of cases can affect application of the doctrines of res judicata and collateral estoppel in a number of ways. It may affect the time of the event (entry of final judgment) that triggers application of the former, and often of the latter, doctrine, and that displaces the less stringent law of the case doctrine. It may influence whose claims are before the judgment rendering court. And it may influence evaluation of the equities considered when the issue is whether a court should apply offensive nonmutual collateral estoppel. In all of these aspects, consolidation has an effect on the procedural rights of litigants. However, since res judicata operates on claims and collateral estoppel on issues—neither focuses on “civil actions”—whether courts regard a group of consolidated cases as a single civil action should not otherwise influence application of those doctrines.

3. Direct and Collateral Attacks

Whether a consolidation is a single civil action or an aggregation of separate civil actions may determine whether one who attacks the judgment(s) therein is making a direct or a collateral attack. Because the grounds for direct attacks are far more numerous and varied than the grounds for collateral attacks, that categorization may affect the rights of an attacking litigant.²⁰⁷

206. Cf. *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 545 (D. Minn. 1982). In *Bertrand*, the court held that in a suit against manufacturers and sellers of products containing asbestos, the court could not, consistently with due process, collaterally estop all defendants on issues of state of the art defense and whether their products were unreasonably dangerous. It decided to collaterally estop none of the defendants, with respect to those issues, because, “[b]ifurcating the trial between those few defendants present in *Borel* [v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974)] [and hence, potentially subject to collateral estoppel] and those not present would require more time and effort than applying collateral estoppel would save.”

207. See generally *Martin v. Wilks*, 490 U.S. 755, 769, 771 & n.5, 772 & n.6, 773 & n.8, 783 & n.21 (1989) (Stevens, J., dissenting) (discussing the grounds upon which collateral attacks may be launched and the policies underlying restriction of those grounds). The dissenting opinion observes, *inter alia*, that, under limited circumstances, both parties to the original action and interested third parties may collaterally attack a judgment for lack of subject matter jurisdiction in the rendering court or if the judgment was “the product of corruption, duress, fraud, collusion, or mistake,” *id.* at 771, but that the grounds for such an attack are much more limited than those that may be asserted as error on direct appeal. *Id.* at 772. “[A] broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts.” *Id.* at 783; see also

The famous Supreme Court pronouncement, quoted repeatedly in this Article, that “consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another,”²⁰⁸ derives from a case that raised the categorization question noted above. Specifically, the question of importance there, from the perspective of this Article, was whether an attack on the appointment of receivers of railroad property was a collateral or direct attack when made in a suit that initially was separately instituted but sought the appointment of receivers of the same property, was brought in the very court that had appointed the receivers, and had been consolidated with the action in which the receivers were appointed. The district court had thought that consolidation of the two suits would render the attack direct. The Court held to the contrary, that the consolidation did not alter the collateral nature of the attack, using the language quoted above.²⁰⁹ Because a collateral attack can be successful only to the extent it discloses a want of power in the judgment rendering court, rather than mere error in the exertion of power exercised by the court,²¹⁰ the attack in *Johnson* failed because it was predicated on error only.²¹¹

As discussed in Part I of this Article, although *Johnson* has never been directly overruled, its vitality and contemporary significance are unclear. First, it co-exists in tension with more recent United States Supreme Court opinions that treat consolidations as single civil actions in making Article

FLEMING JAMES ET AL., CIVIL PROCEDURE 679-92 (4th ed. 1992) (noting that “normal” post-judgment motions and appeals, based upon myriad sorts of errors, usually are denominated “direct attacks,” while a variety of procedures—some archaic and some modern—are referred to as “collateral attacks”; the latter include relief under FED. R. CIV. P. 60(b); independent suits in equity by persons who were not parties to the case culminating in a judgment, where that judgment was void for lack of subject matter jurisdiction or the product of fraud on the petitioner; defenses, based upon voidness of a judgment or its having been procured by fraud, asserted in an enforcement action; other attacks on a judgment as void for lack of personal or subject matter jurisdiction); Comment, *The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 YALE L.J. 526 (1957).

208. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933).

209. *Id.* at 494-97.

210. *Id.* at 496.

211. The Court inquired into the authority of the senior circuit judge to assign to himself the initial litigation, brought by American Brake Shoe. It concluded that he had statutory authority to do so, and that the argument that the assignment was invalid because no public interest required it (as demanded by statute) was not available on collateral attack. *Id.* at 497-504. Having decided to affirm the court of appeals' reversal of the district court's order vacating the decrees and orders entered by the senior judge in *American Brake Shoe*, the Court nonetheless went on to question the wisdom of the senior circuit judge's self-assignment and to opine that, “on further reflection, he will recognize the propriety of . . . withdrawing, [to enable] another judge with appropriate authority to conduct the further proceedings.” *Id.* at 505.

III standing determinations.²¹² This suggests that *Johnson* should not be read broadly and even raises the question whether the Court would adhere to it today. Second, *Johnson* predates the Federal Rules of Civil Procedure, so it does not interpret Rule 42 or the current Rules generally.²¹³ Third, the precise nature of the consolidation ordered in *Johnson* is unclear.²¹⁴ The district judge had consolidated the two cases because he had some doubt of the propriety and efficacy of an order he entered only in *Johnson*'s suit. That order vacated orders by which a senior judge had assigned himself to hear all matters in American Brake Shoe's suit and which that senior judge had then entered in that suit. Thus, the consolidation was not motivated by the usual considerations and may have been for limited purposes.²¹⁵ The basis for, or the limited nature of, the consolidation might make *Johnson* distinguishable from contemporary cases and might make the language for which it is cited inapplicable to those cases.

If none of the foregoing arguments undermines *Johnson*, I would argue that its broad language should be disavowed as applied to consolidations for all purposes or for trial. I agree that cases "consolidated" for only a limited purpose (such as discovery) retain their separate identities. Thus, an attack made in one, on another, constitutes a collateral attack that is subject to the ordinary restrictions on such attacks. However, Part I of this Article, reinforced by Part II, has shown why it is best to regard fully consolidated cases (or cases consolidated for trial) as culminating in a single appealable final judgment, absent Rule 54(b) certification or the presence of some other exception to the final judgment rule.²¹⁶ If that course is followed, an attack on the judgment as it applies to any of the consolidated cases, made by parties to any of the consolidated cases, and made in the judgment rendering court, ordinarily will be a direct attack. A collateral attack typically is made either by persons who were not parties to the case in which the attacked judgment was rendered, or in a court other than that in which the judgment was rendered.²¹⁷ Thus, one who accepts the argument that

212. See Steinman, *supra* note 1, at 728, 735-36 n.56.

213. See *id.* at 733-36.

214. Ringwald v. Harris, 675 F.2d 768, 770 (5th Cir. 1982).

215. The Supreme Court did not review the propriety of the consolidation order because the petitions had not sought reversal of the consolidating decree. *Johnson*, 289 U.S. at 494.

216. See Steinman, *supra* note 1, at 794-807.

217. See *supra* note 207; see, e.g., Martin v. Wilks, 490 U.S. 755 (1989) (holding that white fire fighters who had failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered could challenge employment decisions taken pursuant to those decrees; they were not precluded on theory that their reverse discrimination actions constituted an impermissible collateral attack on the consent decrees); Pennoyer v. Neff, 95 U.S. 714 (1877) (involving a collateral attack in an ejectment action, predicated on lack of personal juris-

consolidated cases should be regarded as a single civil action for final judgment purposes also should embrace the notion that when parties to any component attack the judgment, their attack is direct and not collateral.

In sum, if, as advocated here, courts accept the notion that consolidation creates a single civil action that ordinarily culminates in a single judgment, then consolidation will affect the rights of litigants by changing what now would be collateral attacks on judgments (the grounds of which are very limited) to direct attacks. Advocates of finality might disfavor such a change, while those who regard the correction of error as more important than finality might favor it. As a practical matter, the significance of this change would not likely be great because the arguments available to the newly empowered appellants typically would be available to the losing parties whose attack would be direct under any conception of the civil action and of the parties governed by a judgment. However, on occasions such as that presented by the *Johnson* case, the change in view would be outcome determinative.

E. Peremptory Challenges

Current common law seems generally to guarantee both plaintiffs and defendants the number of peremptory challenges to which they would have been entitled had courts not consolidated their cases. However, as the discussion below demonstrates, the law is not entirely clear in all the factual permutations that cases may present and some cases depart from the usual mold. On policy grounds, this Article argues against the principle stated above. Where the same plaintiff is separately suing defendants whom plaintiff easily could have sued at once, where consolidated cases are composed of repetitious or reactive litigation, and where one would expect multiple plaintiffs to sue the same defendant(s) together, but they did not do so, application of the principle stated above encourages duplicative litigation by rewarding litigants with a larger number of peremptory challenges than they would have enjoyed had they conducted the litigation more efficiently. Even when cases do not fall into any of those categories, proper consolidation should enable courts to treat a repeat player as a single

diction in the judgment rendering court).

The entry of separate judgments in consolidated cases viewed as distinct civil actions also may lead a court to refuse to offset one judgment against another. See, e.g., *General Contracting & Trading Co. v. Interpole, Inc.*, 899 F.2d 109, 112-13 (1st Cir. 1990) (involving cases consolidated only for hearing on damages; decided under state law). The outcome might well be different if the court viewed a consolidation (for all purposes or for trial) as having created a single civil action.

party and litigants aligned together as coparties who are subject to being considered as a single party, in determining the number of peremptory challenges available as a matter of right. In this way, treating a consolidation as a single civil action has the potential to reduce the number of peremptory challenges to which parties are entitled. Whenever fairness dictates that parties have more peremptory challenges than they would be entitled to under this approach, however, the courts should liberally exercise the discretion expressly given them by statute to increase the number of peremptory challenges that parties may exercise.

Title 28 U.S.C. section 1870 provides, in part: "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly."²¹⁸

Under the first sentence (the entitlement clause) of 28 U.S.C. section 1870, in each civil case, each party is entitled to three peremptory challenges. However, under the first part of the second sentence (the lumping clause), that entitlement is qualified: the court may "lump together" co-plaintiffs and/or co-defendants, while under the second part of the second sentence (the discretionary add-on clause), the court may allow additional peremptory challenges. Given this statutory scheme, how courts define a "civil case" and the several defendants or several plaintiffs to a "civil case" is important in determining the number of peremptory challenges to which litigants have an absolute right. A court's view on those matters will not be determinative of the number of peremptory challenges available to a litigant, however, because the court, in its discretion, may afford additional challenges.

If courts were to treat a consolidation for all purposes or for trial as a single civil case, a person who is a party to more than one of the antecedent actions might be counted as only one party and hence be entitled to fewer peremptory challenges than if the consolidation were treated as an aggregate of separate actions. Similarly, persons regarded as coparties (that is, as "several" plaintiffs or defendants) only by virtue of a consolidation could be treated as a single party (under the lumping clause), for purposes of the entitlement clause, when they would have to be treated as separate

218. 28 U.S.C. § 1870 (1988).

parties under the entitlement clause if the consolidation were treated as composed of separate actions.²¹⁹

For example, if *P* filed three cases: *P v. D1*, *P v. D2*, and *P v. D3*, which were consolidated, traditionally *P* would be entitled to nine challenges and each of the three *Ds* would be entitled to three challenges, for a total of nine. If the consolidation were conceived of as a single civil action, *P* might be entitled only to three challenges, subject to discretionary increase by the court. Each *D* might be afforded three challenges or, under the lumping clause, the court might allow the defendants collectively three challenges, again subject to discretionary increase by the court. Treating the consolidation as a single civil action thus has the effect of reducing the number of peremptory challenges to which parties are absolutely entitled, and consequently of increasing the significance of the court's discretion to "lump" together or not "lump" together co-parties and of its discretion to allow additional peremptory challenges. Whether, or in what circumstances, these effects are desirable is a policy matter.

Where the consolidated cases are composed of repetitious or reactive litigation,²²⁰ the challenge-reducing result seems to me clearly desirable. The judicial system should not encourage duplicative litigation by rewarding litigants with a number of peremptory challenges beyond that to which they would have been entitled had they conducted the litigation more efficiently. The desirability of the outcome is less clear in merely related litigation,²²¹ where reasons worthy of greater respect—including inability to assert claims together under the Federal Rules or under jurisdictional restrictions—may explain and justify the commencement of multiple related

219. Although the statute permits courts to treat "several defendants or several plaintiffs" as a single party for purposes of making challenges to potential jurors, as construed that language permits courts to treat not only co-parties as a single party but also, for example, defendants and third-party defendants. See, e.g., *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3d Cir. 1978) (holding it within court's discretion to treat defendant and third-party defendants as single party for purposes of allowing peremptory challenges; court here required those parties to share the same number of peremptory challenges as it allocated to a single plaintiff); *Carey v. Lykes Bros. S.S. Co.*, 455 F.2d 1192, 1194 (5th Cir. 1972) (same; court here allowed plaintiff ten and defendant and third-party defendant five peremptory challenges, respectively); *Moore v. South African Marine Corp.*, 469 F.2d 280, 281 (5th Cir. 1972) (finding no error in court's requiring defendant and third-party defendant to share the same number of peremptory challenges as allowed to the plaintiff).

220. See Steinman, *supra* note 1, at 725-26.

221. See *id.*

civil actions.²²² Nonetheless, consolidation is designed to enable courts to override parties' decisions as to the boundaries of litigation so that the courts may create more efficient litigation units and manage litigation more productively and fairly. These policies suggest that proper consolidation should enable courts to treat a single, repeatedly-suing plaintiff as a single party and multiple defendants as co-defendants in determining the number of peremptory challenges to which the parties are entitled. This is the consequence of treating a consolidation as a single civil action.²²³

Fact patterns in which different plaintiffs sue the same defendant in suits that are consolidated pose similar questions. Traditionally, each plaintiff would be entitled to three challenges and the defendant would be entitled to three challenges multiplied by the number of cases in which he was sued. If the consolidation were conceived of as a single civil action, the repeat defendant might be entitled only to three challenges, subject to discretionary adjustment upward by the court. (Moreover, if there were multiple defendants, they might be lumped together by the court, for peremptory challenge purposes.) Each plaintiff might be afforded three challenges or, under the lumping clause, the court might allow the plaintiffs collectively three (or more) challenges. Treating the consolidation as a

222. See 9 WRIGHT & MILLER, *supra* note 50, § 2385, at 465 (In view of their statutory discretion, "[f]ederal judges . . . now are more willing to grant as many peremptory challenges as if the consolidated cases were tried separately."). Claims can be consolidated that could not be brought together because consolidation is available so long as actions pending before the court involve a common question of law or fact, FED. R. CIV. P. 42, but plaintiffs may join in one action only if they assert a right to relief "in respect of or arising out of the same transaction, occurrence, or series" thereof and if a "question of law or fact common to all these persons will arise in the action." FED. R. CIV. P. 20. Similarly, plaintiffs may join defendants in one action only if plaintiffs assert against defendants a "right to relief in respect of or arising out of the same transaction, occurrence, or series . . . [thereof] and if any question of law or fact common to all defendants will arise in the action." FED. R. CIV. P. 20. Jurisdictional restrictions might prevent claims from being brought together that nonetheless could be consolidated because courts ordinarily determine jurisdiction with respect to the antecedent actions individually. See Steinman, *supra* note 1, at 750-52 & n.123. Thus, a federal court could have diversity jurisdiction over the action of a New York citizen against a Wisconsin citizen, and over the action of a Wisconsin citizen against an Illinois citizen, and the suits could be consolidated (assuming a common question of law or fact and that the two suits were pending in the same district court) although diversity jurisdiction would be lacking if the two plaintiffs brought suit together against the two defendants.

223. It also is consistent with the trend of decisions to curtail the exercise of peremptory challenges, although those decisions have been predicated on indications of invidious discrimination. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (holding that Equal Protection Clause prohibits discrimination in jury selection on the basis of gender or on the assumption that an individual will be biased solely because of his or her gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that private litigant's exercise of racially discriminatory peremptory challenge offends Equal Protection Clause).

single civil action again reduces the number of peremptory challenges to which parties are absolutely entitled, and consequently increases the significance of the courts' discretion to "lump" together or not "lump" together co-parties and to allow additional peremptory challenges.

Where the various plaintiffs would naturally have sued together (for example, where they had a relationship that predated the incident generating the lawsuit, particularly a familial relationship such as that of spouses or parent and child), the system should not encourage duplicative litigation by rewarding litigants who sue separately with a number of peremptory challenges beyond that to which they would have been entitled had they sued together. The desirability of reducing peremptory challenges-of-right is less clear in litigation where reasons worthy of greater respect—including inability to assert claims together under the Federal Rules or under jurisdictional restrictions—justify the commencement of multiple related civil actions. However, consolidation can create a single civil action where the parties could not or chose not to do so. In light of the courts' ability to substitute its judgment on the appropriate scope of the litigation, proper consolidation should enable courts to treat multiple plaintiffs as co-plaintiffs and a single defendant as a single party in determining the number of peremptory challenges to which the parties are entitled.

Where suits are consolidated in which no plaintiff and no defendant is a "repeat player," the court's view of the consolidation still can influence the parties' entitlement to peremptory challenges, through operation of the lumping clause: litigants who otherwise would be independently considered could be treated as co-parties subject to "lumping" (with consequent reduction of their challenges) if, but only if, the consolidation were treated as a single civil action.²²⁴ For the reasons elaborated above, courts should be able to treat multiple plaintiffs and defendants as co-parties for peremptory challenge purposes, upon proper consolidation of actions. Although parties' rights clearly are adversely affected by a reduction in the number of peremptory challenges to which they are entitled, where courts view the reduction as prejudicial or otherwise inappropriate they easily can increase

224. It is possible that on some occasions where P1 has sued D1, and P2 has sued D2, P1 and P2 could have sued both D1 and D2 and did not do so as a function of a strategy to increase the number of peremptory challenges available to them. This tactical behavior seems unlikely, however, in view of the possibility that the court would increase the number of challenges allowed to the two plaintiffs in such a joint action, the risk that the actions would not be consolidated or that the consolidation would not be given its hoped for effect on the number of challenges available, and other potential disadvantages of each plaintiff's failure to assert claims against both defendants.

the available number of peremptory challenges as a matter of discretion.²²⁵

When courts actually have construed and applied the peremptory challenge statute in the context of consolidated cases, the results have been mixed. Consider first fact patterns involving the same plaintiff suing different defendants in cases that are consolidated. In those cases, the focus sometimes has been on the number of peremptory challenges to which the defendants were entitled, and sometimes has been on the number of peremptory challenges to which the plaintiff was entitled. In *Mutual Life Insurance Co. v. Hillmon*,²²⁶ the trial court had consolidated for trial three cases, brought by the same plaintiff, each against a different insurance company that had issued a life insurance policy on plaintiff's husband's life. The trial court allowed the defendants collectively only three peremptory challenges. The Supreme Court spoke of the English origins of consolidation of such insurance cases and of how American courts order it where defendants rely on the same defense. The Court then said:

[T]he causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived . . . of any right material to its defence [sic], whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. . . . [D]efendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together.²²⁷

225. In a number of instances, state courts have held that "the consolidated parties were not each entitled to the full number of peremptory challenges allowed by statute to each 'party,' but were collectively entitled only to the number allowed to one 'party,' at least if the formally united parties were not regarded as [having] diverse interests." Donald E. Evins, Annotation, *Jury: Number of Peremptory Challenges Allowable in Civil Case Where There Are More than Two Parties Involved*, 32 A.L.R.3d 747, 772 (1970) (emphasis added) (citing cases at 772-74); see, e.g., *Utilities Serv., Inc. v. Replogle*, 110 So. 2d 438, 440 (Fla. Dist. Ct. App.), cert. discharged, 114 So. 2d 6 (Fla. 1959) (allowing only three peremptory challenges to a husband and wife whose claims, arising out of injury to her, had been consolidated); *R.E. Gaddie, Inc. v. Evans*, 394 S.W.2d 118, 120 (Ky. 1965) (absent a showing of antagonism between the plaintiffs, allowing only three peremptory challenges to two individuals injured in a collision, whose claims had been consolidated). The A.L.R. annotation indicates, however, that such decisions constitute a minority of the cases raising such issues. Particularly where those parties brought together by consolidation had interests that diverged, the courts have tended to hold each individually entitled to the number of peremptory challenges prescribed for each party. See Evins, *supra*, at 772-74.

226. 145 U.S. 285 (1892).

227. *Id.* at 293-94. The statute governing peremptory challenges at the time provided that in all civil cases, "each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section." U.S. REV. STAT. § 819 (1874)

Having held that, in the circumstances presented, consolidation for trial could not reduce the number of peremptory challenges available to defendants, the Court held the defendants entitled to a new trial.

The Court thus treated each antecedent suit as a separate case; it did not regard the defendants, brought together by the consolidation, as co-parties whom the court could lump together.²²⁸ Particularly in situations where the plaintiff could have sued all the defendants together, this result seems questionable as a matter of policy since, in effect, the defendants receive a windfall of peremptory challenges as a result of the plaintiff's failure to sue them as co-defendants.

After the remand in *Hillmon*, one of the defendants settled and the case was retried against the remaining two defendants. The question arose whether the plaintiff was entitled to six peremptory challenges (three for each remaining civil action it had brought) or only three. The trial court held the plaintiff entitled to six, on the theory that

if consolidated causes are treated separately, so far as the defendants are concerned, for the purpose of preserving to them their respective rights of challenge,—we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same num-

& Supp. 1901). The consolidation provision then in effect provided that “when causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.” *Id.* § 921.

228. See generally 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2483, at 126 (citing *Hillmon* in support of the proposition that “[t]he predecessor of Section 1870 of the Judicial Code [§ 819 of the Revised Statutes] . . . was held not to limit the number of peremptory challenges when actions are consolidated for trial. [That is an overstatement.] Thus, if consolidation results in multiple parties on one or both sides of the action, each party in the consolidated action is entitled to three challenges.” (footnote omitted)). See also *Stanford v. Tennessee Valley Auth.*, 18 F.R.D. 152, 155 (M.D. Tenn. 1955) (holding two defendants misjoined under Federal Rule of Civil Procedure 20 and consequently ordering separate complaints, motions, verdicts, and judgments, but ordering a joint trial because of common questions of law or fact, and observing that “[s]uch an order, as contrasted with a consolidation, will preserve to each defendant the procedural advantages of a separate trial, including the right to peremptory challenges of jurors”). Other courts have read this first *Hillmon* case to stand for propositions that I do not see that it represents. For example, *Davis v. Jessup*, 2 F.2d 433, 434 (6th Cir. 1924), cites it for the proposition that “the plaintiff in each of several cases not consolidated, but, because of a common defendant, tried together, is entitled to three peremptory challenges.” *United Verde Copper Co. v. Jordan*, 14 F.2d 299, 302 (9th Cir.), *cert. denied*, 273 U.S. 734 (1926), approves the *Davis* court’s construction of the two Supreme Court decisions in *Hillmon*. The second is discussed *infra* text accompanying notes 229–232.

ber of challenges which she would have been entitled to had the cases been tried separately.²²⁹

One of the defendants complained that the plaintiff had six challenges while each of the defendants had only three.²³⁰ It somehow believed that its position was supported by the principle that "plaintiff was not entitled to any more challenges than she would have been entitled to, in case the consolidation had not taken place."²³¹ It is hard to understand why defendant thought this proposition useful since, had the consolidation not been ordered, plaintiff would have had two actions, and a total of six peremptory challenges, three in each. Defendant's argument seems to envision a situation in which, absent the consolidation, plaintiff would have had one action against two defendants; but that was not the procedural history. The Supreme Court, in dicta, conceded that the great weight of authority supported the legal proposition urged by defendant, but the Court concluded that defendant could not take advantage of this rule because, having made only two peremptory challenges, it had acquiesced in the composition of the jury.²³²

I question the Court's reasoning since the composition of the jury may have been affected by plaintiff's exercise of as many as six peremptory challenges, notwithstanding defendant's failure to use all its own challenges.²³³ More importantly for present purposes, the Court did not clearly indicate whether, under the circumstances, the plaintiff was entitled to six peremptories or only to three, or whether and how the proposition advocated by the defendant supported the result the defendant sought.

229. See *Connecticut Mut. Life Ins. Co. v. Hillmon*, 107 F. 834, 842 (8th Cir. 1901), *rev'd on other grounds*, 188 U.S. 208 (1903).

230. *Hillmon*, 188 U.S. at 211.

231. *Id.*

232. *Id.* at 211-12. The court in *Davis* viewed the proposition that the *Hillmon* Court conceded was supported by the great weight of authority to be that a single plaintiff in two consolidated cases was entitled to but three challenges. 2 F.2d at 434. I do not agree with that reading. I do agree with the *Davis* court, however, that "the court did not affirm the correctness of the proposition or give its approval thereto." *Id.*

233. The courts recognize that allowing a party a greater number of peremptory challenges than is specified by statute can be reversible error. Most courts will not reverse unless the complaining party shows that he has exhausted his peremptory challenges and has suffered material injury as a result of the error. Such courts look for evidence that an impartial jury may not have been selected. Other courts, however, view the allowance and exercise of an excess number of peremptory challenges as per se prejudicial and reversible error, without a showing of actual prejudice. See G.R. Jacobi, Annotation, *Effect of Allowing Excessive Number of Peremptory Challenges*, 95 A.L.R.2d 957, 971 (1964). By comparison, in criminal cases, an infringement of a defendant's right to assert peremptory challenges of potential jurors has been held to be a structural defect in the trial that is not subject to harmless error analysis. *Lyons v. United States*, 645 A.2d 574, 580 (D.C.), *vacated, reh'g en banc granted*, 650 A.2d 183 (D.C. 1994).

In a misleading headnote, the syllabus writer for the Supreme Court opinion described it as stating that the weight of authority is that the right of a plaintiff (who has brought separate actions against different defendants, which have been consolidated) is not multiplied to correspond to the number of peremptory challenges available to the defendants; that she is entitled to but three.²³⁴

Notwithstanding the syllabus writer's interpretation, the Court of Appeals for the Fourth Circuit, in an opinion written just a few years later, in *Butler v. Evening Post Publishing Co.*,²³⁵ held that a trial judge had erred in limiting plaintiffs to three peremptory challenges where they had brought separate libel suits against two newspapers, and the suits had been consolidated and tried together on a motion of plaintiffs' counsel, suggested by the court. Under these circumstances, moving for consolidation did not deprive plaintiffs of their rights of challenge. The court apparently also thought it important that plaintiffs' causes of action against the two defendants were separate and distinct; liability was not joint. As a result, the jury had properly been instructed to return a verdict as to each defendant. In the appellate court's view, these considerations meant that there were "to all intents and purposes, two trials,"²³⁶ although conducted simultaneously and to the same jury. The implication of the decision is that plaintiffs were entitled to six peremptory challenges.²³⁷

234. *Hillmon*, 188 U.S. at 208.

235. 148 F. 821 (4th Cir. 1906), *cert. denied sub nom. News & Courier Co. v. Butler*, 204 U.S. 670 (1907).

236. *Id.* at 824. The court in *Davis*, in a misconstruction of the syllabus to *Butler*, cites *Butler* for the proposition that, when a plaintiff's several cases are tried together because of a common defendant, "the single defendant . . . is entitled to the same number of challenges as all of the plaintiffs." 2 F.2d at 434. In fact, federal courts have discretion under the federal statute to give plaintiffs and defendants unequal numbers of peremptory challenges. *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir.) (holding that where defendants did not have even colorably differing interests, magistrate abused discretion in failing to equalize the number of peremptory challenges as between plaintiff and defendants), *cert. denied*, 496 U.S. 852 (1984); *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir.) (finding no abuse of discretion in granting each of two plaintiffs three peremptory challenges and each of five defendants two such challenges), *cert. denied*, 414 U.S. 829 (1973); *cf. Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 767-68 (5th Cir. 1968) (limiting plaintiff to three peremptory challenges while allowing the defendant and the third-party defendant three such challenges each), *cert. denied*, 396 U.S. 819 (1969); *Mattocks v. Daylin, Inc.*, 78 F.R.D. 663 (W.D. Pa. 1978) (same), *rev'd on other grounds*, 611 F.2d 30 (3d Cir. 1979); *Rogers v. De Vries & Co.*, 236 F. Supp. 110 (S.D. Tex. 1964) (same). The federal statute differs in this respect from some states' statutes. See generally *Evins*, *supra* note 225, at 754-55, 793-95.

237. *Accord United Verde Copper Co. v. Jordan*, 14 F.2d 299 (9th Cir.) (affirming where trial court had allowed six peremptory challenges to plaintiffs while refusing to permit defendant to exercise more than three, in context where identical plaintiffs brought separate actions against each of two defendants and the actions had been consolidated for trial, separate verdicts entered),

Insufficient authority exists to firmly establish whether, when the same plaintiff brings related actions against different defendants and the cases are consolidated for trial or more broadly, the plaintiff will be limited to three peremptory challenges or will be permitted challenges numbering three times as many actions as he or she commenced. *Butler* and some other authority take the position that such a plaintiff is entitled to the greater number of peremptories, and *Hillmon* does not preclude that result.²³⁸ But the statute on its face does not require that outcome, particularly if a consolidation is treated as a single civil action. Moreover, for reasons elaborated above, policy would dictate that the outcome be different, that proper consolidation enable the courts to treat a repeatedly suing plaintiff as a single party in determining the number of peremptory challenges to which that person is entitled, and especially so when the plaintiff properly could have brought a single civil action against all the defendants and has no compelling reason for having failed to do so.

When different plaintiffs have sued the same defendants in cases that are consolidated for trial or more broadly, the focus virtually always has been on the number of peremptory challenges to which the defendants were entitled, not on the number of peremptory challenges to which the plaintiffs were entitled. The courts' responses have been mixed. Most courts hold or indicate that the defendants must be permitted as

cert. denied, 273 U.S. 734 (1926). This case is consistent with *Butler* in affording plaintiffs six challenges where they had commenced two suits. Only one defendant appealed, and it had been allowed three. The opinion does not make clear whether the other defendant also had been allowed three peremptories or whether the trial court had utilized § 287 of the Judicial Code, COMP. STAT. § 1264, to justify limiting the defendants collectively to three peremptory challenges. The court described that section as providing, *inter alia*, that "where there are several defendants or several plaintiffs[,] the parties on each side shall be deemed a single party for the purposes of all challenges." *United Verde*, 14 F.2d at 301 (emphasis added). The court was not quoting the statute. *But see* *Smith v. Pressed Steel Tank Co.*, 66 F.R.D. 429, 436 (E.D. Pa.), *aff'd without opinion*, 524 F.2d 1404 (3d Cir. 1975). In *Smith*, two plaintiffs, co-employees of the defendant companies, successive owners/employers, separately sued for injuries from industrial pollution. The cases were consolidated and tried together, with liability tried before damages, and defendants prevailing. The court could not find that plaintiffs had taken exception to the number of peremptory challenges allowed, which precluded consideration of any error, but, that aside, invoked the principle that the court "may consider several plaintiffs or defendants as a single party for the purposes of making challenges," and concluded that the court had not abused its discretion under 28 U.S.C. § 1870. The court showed no sensitivity to how consolidation might interact with this principle. The opinion does not say how many challenges were permitted either to the plaintiffs or to the defendants and the record failed to make clear whether appellants' argument was that plaintiffs were allowed too few or defendants too many.

238. *Accord* 9A WRIGHT & MILLER, *supra* note 228, § 2483, at 126 ("It is unclear, however, whether a single party in a consolidated action is entitled to three peremptory challenges multiplied by the number of the actions consolidated or only three challenges total. When actions simply are tried together, the parties are not limited to three challenges." (footnotes omitted)).

many peremptory challenges as they would have been permitted absent consolidation.²³⁹ But courts sometimes have concluded otherwise. One noteworthy case, which bridges these two positions, is *Stone v. United States*.²⁴⁰ The U.S. had brought two actions to recover the value of timber alleged to have been wrongfully taken from public lands. In one case, Stone was the sole defendant; in the other, he was one of three defendants. The cases were consolidated and tried together, and the U.S. won both. Stone appealed only the action that had been brought against him alone. He argued that the court erred in refusing to allow the defendants (including himself) in the other case to peremptorily challenge a juror; in the case on appeal, he had exercised all three of the challenges to which he was entitled. Conceding that the two causes remained separate and distinct and required separate verdicts and judgments, the Ninth Circuit reasoned that if the case against Stone had been tried by itself, Stone could not have claimed more than three peremptories and that he was entitled to no more, in that case, by reason of the consolidation. The defendants in the other case were entitled to three peremptory challenges, and if the court had accorded them their right, Stone might have benefited, but that would follow "by the circumstance of the consolidation, and [by] the fact that he was a party defendant in both actions, instead of by virtue of any legal rights given to him by the law as a defendant in this action."²⁴¹ In effect,

239. See, e.g., *Signal Mountain Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944). In *Brown*, where five cases were brought against a single defendant by separate plaintiffs on separate causes of action, all based on an industrial nuisance allegedly maintained by the defendant, and the cases were tried together for convenience but not consolidated (as evidenced *inter alia* by pleadings, motions, orders, verdicts, and judgments having been separately drawn, filed and entered, and the absence of even a signed order consolidating the cases for trial), limitation of defendant to three peremptory challenges was reversible error under § 287 of the Judicial Code (another predecessor of 28 U.S.C. § 1870). Defendant was entitled to fifteen challenges. The trial court had given the collective plaintiffs and defendant three such challenges, citing the consolidation of the cases. See, e.g., *Davis*, 2 F.2d at 434. There, where three cases with overlapping plaintiffs were brought against a defendant, the court disavowed the trial court's view that "the single party, although entitled to as many peremptory challenges as the aggregate number to which the opposing parties may be entitled, must designate the case to which each peremptory challenge is to apply, at the risk of having each challenge construed as applying to each case." *Id.* It is not clear whether the court disavowed only the second part of this proposition, or both portions. Noting that the cases were not and, at least as to one of them, could not have been consolidated into a single action (the court did not say why this was so), it reversed, where the trial court had allowed the defendant only three peremptory challenges, as against the nine that defendant claimed. See, e.g., *Allen v. United Mine Workers*, 30 F.R.D. 41, 43 (E.D. Tenn. 1962) (ruling in favor of plaintiffs' motion to consolidate for trial two cases brought by different plaintiffs against the same defendant, but reassuring the defendant that such consolidation would not deprive the parties of the right to their peremptory challenges in each case).

240. 64 F. 667 (9th Cir. 1894), *aff'd*, 167 U.S. 178 (1897).

241. *Id.* at 673.

Stone was denied standing to complain that the court had committed an error in the other case, the judgment in which he had not appealed.²⁴²

The points of interest in *Stone* are the court's views that a repeat defendant in cases consolidated for trial is entitled to peremptory challenges for each case in which he was joined (he is not limited to a total of three), but that such a defendant cannot invoke his challenges without indicating the case (or cases) to which they apply, and cannot use in excess of three peremptories in any single case.²⁴³ This latter point is a bit peculiar. It makes sense to allocate peremptory challenges between or among consolidated cases only if juries of somewhat different compositions are to act as the triers of fact in the various cases; then a juror excused from one jury on the basis of a peremptory challenge could sit on a jury hearing another of the consolidated cases. But if one jury is to hear all the consolidated cases, a person is either on that jury or he is not. If a repeat defendant is entitled to peremptory challenges for each case in which he was joined, one must aggregate his challenges, and the court's refusal to permit him the aggregate number should be reversible error in any one or more of the consolidated cases.

I question, however, whether the repeat defendant should be held entitled to peremptories equal in number to three times the number of cases in which he was sued. Particularly where one would expect the plaintiffs to sue together, the result is a windfall in peremptories available to the defendant. I propose that repeat defendants should be limited to three peremptory challenges-of-right. If such defendants can persuade the court that they should be allowed more than three peremptory challenges, the court can allow additional challenges, in its discretion.

242. The Supreme Court opinion is to the same effect. See *Stone v. United States*, 167 U.S. 178, 189 (1897). In the case against Stone alone, he had the benefit of three peremptory challenges. The Court noted that "[i]n the other case the judgment was arrested and the verdict was set aside. If the court committed any error in not allowing [an additional challenge in the multi-defendant case], that error did not prejudice Stone in the present case."

243. But see *Davis*, 2 F.2d at 434 (disavowing the trial court's view that "the single party, although entitled to as many peremptory challenges as the aggregate number to which the opposing parties may be entitled, must designate the case to which each peremptory challenge is to apply, at the risk of having each challenge construed as applying to each case," where three cases with overlapping plaintiffs were brought against a defendant).

Another unusual case was *Matanuska Valley Lines, Inc. v. Neal*.²⁴⁴ Three actions were brought by three injured passengers and two of their spouses against the owner/driver of a truck and the owner of a bus on which three of the plaintiffs were passengers. The cases were consolidated and tried before a single jury, the trial court permitting the defendants collectively only three peremptory challenges. The bus company appealed. The Court of Appeals for the Ninth Circuit concluded, without explanation, that the allowance of challenges was correct, and that the record failed to show the prejudice that the court held to be necessary for a reversal. It noted that the trial court had offered to allow *an* additional challenge to the bus company if it showed good cause therefor but counsel had demanded an additional peremptory challenge as a matter of right.²⁴⁵

The trial court had made its ruling with knowledge of the *Hillmon*²⁴⁶ and *United Verde*²⁴⁷ decisions but found them distinguishable on their facts. Whether the court was reasoning by analogy or acting on the belief that federal law was either silent or inapplicable is not clear, but it relied on an Alaska statute governing peremptories.²⁴⁸ The principles the trial court invoked, based on Alaska precedent, were the following: if consolidated actions could have been joined, their consolidation can not enlarge the number of challenges otherwise available; and if consolidated actions could not have been brought as one, the parties are entitled to additional challenges beyond those that otherwise would be available.²⁴⁹ The trial court viewed these principles as distinguishing *Hillmon* and *United Verde* from the case at bar, notwithstanding that the courts deciding those cases had made no mention of the distinctions found in Alaska law. The trial court apparently viewed the aforementioned principles, as applied, to imply

244. 255 F.2d 632 (9th Cir. 1957).

245. *Id.* at 635-36.

246. 145 U.S. 285 (1892).

247. 14 F.2d 299 (9th Cir.), *cert. denied*, 273 U.S. 734 (1926).

248. The Alaska statute relied on by the court, A.C.L.A. § 55-7-50 (1949), provided that "[a] peremptory challenge or a challenge for cause may be taken by either party. When there are two or more parties, plaintiffs or defendants, they must join in the challenge or it can not be taken. Either party shall be entitled to three peremptory challenges and no more." *Neal v. Matanuska Valley Lines*, 118 F. Supp. 355, 357 (D. Alaska 1954), *aff'd*, 255 F.2d 632 (9th Cir. 1957).

249. *Neal*, 118 F. Supp. at 357-58.

that, because the suits could have been brought as one, the defendants had to share three peremptory challenges.²⁵⁰

Whatever the merits of the Alaska law on peremptory challenges, why the trial court thought it relevant is not clear. If it was not relevant and *Hillmon* was not distinguishable, *Hillmon* would make the trial court's decision erroneous.²⁵¹ And if the trial court erred in requiring the defendants to make a showing of prejudice as a prerequisite to the exercise of more than three peremptory challenges, the defendant-appellant ought not to have lost by virtue of having failed to make the demanded showing.

In summary, current common law seems generally to guarantee both plaintiffs and defendants the same number of peremptory challenges as they would have been entitled to had courts not consolidated their cases. However, the law is not entirely clear in all the factual permutations that cases may present and some cases depart from this general principle. On policy grounds, this Article has argued against this principle. Where the same plaintiff is separately suing defendants whom plaintiff easily could have sued at once, where consolidated cases are composed of repetitious or reactive litigation, and where one would expect multiple plaintiffs to sue the same defendant(s) together, but they did not do so, application of the principle stated above encourages duplicative litigation by rewarding litigants with a larger number of peremptory challenges than they would have enjoyed had they conducted the litigation more efficiently. Even when cases do not fall into any of those categories, proper consolidation should enable courts to treat a repeat player as a single party and litigants aligned together as co-parties (as "several" plaintiffs or defendants) subject to "lumping" in determining the number of peremptory challenges to which the parties are entitled. In this way, treating a consolidation as a single civil action has the potential to reduce the number of peremptory challenges to which parties are entitled. Whenever fairness dictates that parties have more peremptory challenges than they would be entitled to under this approach, however,

250. The court also advanced additional reasons why the limits it imposed on peremptory challenges were not erroneous. Those reasons related to the appellant's failure immediately to object, to make clear the grounds of complaint, and the like. *Id.*

251. *Hillmon* can be distinguished because it was based on a single plaintiff separately suing multiple defendants, whereas the *Neal* case dealt with multiple plaintiffs separately suing the same defendants. However, the *Hillmon* principle, that consolidation may not deprive parties of the number of peremptory challenges to which they would have been entitled absent consolidation, could govern in both situations.

the courts should liberally exercise the discretion expressly given them by the statute to increase the number of peremptories that parties may exercise.

F. Attorneys' Fees and Taxable Costs

The federal law governing the award of attorneys' fees and the taxation of costs generally²⁵² is such that whether courts regard case consolidations as single civil actions or as a number of civil actions will not affect the entitlement decisions as to which parties will be awarded attorneys' fees and costs, and for what successes. On the other hand, the availability of witness fees and other taxable costs may depend on whether the court "sees" one or many civil actions in a consolidation, and state attorneys' fee law may create entitlement issues whose resolution is affected by consolidation. Moreover, whether state or federal attorneys' fee law is applicable, which attorneys are active in the litigation and consequently earn fees is affected by consolidation, although it is not affected by how many civil actions the court counts.²⁵³ Certainly, the stakes for lawyers may be dramatically amplified by consolidation. The use of lead and liaison counsel and the relative submersion of other counsel retained by parties, which is characteristic of at least large consolidations, substantially affect the allocation of earnings among lawyers with clients in the consolidation. Consolidation thus creates both entitlement and apportionment issues from the perspective of attorneys and, particularly when fees are awarded pursuant to a fee-shifting statute, creates correlative issues for the parties. While the courts' approach to fee allocation, in both statutory and common fund situations, has fairly reflected the functioning of counsel in consolidated litigation, in the

252. The law governing the award of attorneys' fees generally is a vast subject in itself. See generally ALBA CONTE, ATTORNEY FEE AWARDS (1993 & Nov. 1994 Supp.); MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES (1990 & Oct. 1990 Supp.); ALAN HIRSCH & DIANE SHEEHY, AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION (Federal Judicial Center 1994). The major exceptions to the usual rule that each party bears its own attorneys' fees are common fund and common benefit doctrine, statutory authorizations, and sanctionable behavior. See CONTE, *supra*, § 1.01, at 2.

253. Judges in consolidated actions can influence in subtler ways the fees to which attorneys may become entitled. "[T]hey can require all parties to use uniform pleadings and otherwise restrict parties' freedom to address unique issues; and they can order trials of test cases involving few plaintiffs and apply the results to all pending suits." Silver, *supra* note 25, at 499-500. These judicial influences on fees are by no means limited to case consolidations, however. They exist, to varying degrees and in varying forms, in all litigation.

context of fees awarded under such statutes especially, that approach is difficult to square with the formally non-representational nature of consolidated litigation. In general, the dimensions of the statutory rights of parties to have their lawyers compensated by losing litigants, and of the common law rights of parties to have their lawyers compensated out of recovered funds, *are* altered by consolidation. Finally, the timing of attorneys' fees awards and their appeal *are* affected by whether courts regard case consolidations as single civil actions or as a number of civil actions.²⁵⁴

When a fee applicant prevails on multiple claims or defenses, the court may face complications in determining the proper fee award if fewer than all of the claims or defenses carry an entitlement to a fee award. Similarly, when a fee applicant prevails on fewer than all the claims he has asserted or defended against, the court may face complications in determining the proper fee award depending on whether the victories were only on fee-carrying claims, only on non-fee carrying claims, or on some mix of the two. Finally, a court's decision to resolve fewer than all of the claims asserted also may pose complications in determining the proper fee award.²⁵⁵ Such situations may arise in consolidated cases as well as in others, but they are single party, multi-claim, complications; and there is no reason why courts should handle them any differently when they happen to arise in consolidated cases.

In multiparty, hence typically multiclaim litigation, some parties may prevail on their claims or defenses while their co-parties fail on theirs. In such situations, the courts ordinarily award attorneys' fees to each prevailing party (when the law would authorize fees to a prevailing party who sued

254. Notwithstanding the significant practical effects that consolidation may have on these aspects of attorneys' fees, treatises concerning attorneys' fee awards typically fail to isolate judicial opinions generated by consolidations and afford no distinct analysis of such opinions. Because index makers, in their collections of cases on attorneys' fees, also do not distinguish consolidated cases from cases that begin and remain separate actions or from class actions, extensive research would be required to identify and analyze this set of cases in detail. I have not made anything like an exhaustive attempt to identify consolidated cases in which attorneys' fee issues were litigated. I offer here merely illustrations and a broad overview of the application of attorneys' fee law in consolidated cases.

255. For discussion of, and recommendations concerning, the law in each of the aforementioned situations, see generally, DERFNER & WOLF, *supra* note 252, ¶¶ 12.01-.03, 16.02[6].

alone),²⁵⁶ while denying them to the co-parties who failed to prevail.²⁵⁷ The same holds true in consolidated cases.²⁵⁸ Thus, in *Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians*,²⁵⁹ an attorney who had performed no services in support of a successful claim, for which fees were being awarded to others, was not entitled to share in that award, notwithstanding that a case in which he represented a plaintiff had been consolidated with the cases in which the successful claim had been prosecuted.²⁶⁰ In support of its conclusion, the court cited *Johnson v. Manhattan Railway*²⁶¹ for the proposition that the consolidation for trial

256. This outcome is appropriate whether fees are awarded pursuant to statutory provisions that authorize fees to prevailing parties or pursuant to common fund and common benefit doctrines, which require one who seeks fees to demonstrate that, through his or her efforts, a common fund or benefit was created, preserved, or enhanced for the benefit of others. See CONTE, *supra* note 252, § 1.05, at 8–9. At least seventy-five federal statutes, a number of which are particularly relevant to complex litigation, provide for fee shifting. See Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41, 41 n.3 (1991) (citing fee shifting statutes pertinent to antitrust claims, civil rights, consumer claims, copyright, and patent claims).

257. However, work on the claims of losing plaintiffs that was useful in proving the claims of prevailing plaintiffs is compensable. See generally DERFNER & WOLF, *supra* note 252, ¶ 16.02[6], at 16-40.1 (citing *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 581 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Williams v. Butler*, 746 F.2d 431, 442–43 (8th Cir. 1984), *modified on other grounds*, 762 F.2d 73 (8th Cir. 1985) (en banc), *vacated on other grounds sub nom. City of Little Rock v. Williams*, 475 U.S. 1105 (1986); *Barnes v. Bosley*, 745 F.2d 501, 508–09 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Maxwell v. Lucky Constr. Co.*, 710 F.2d 1395, 1399–1400 (9th Cir. 1983)). Derfner and Wolf also write that “courts have generally held that the plaintiff may recover from the losing defendant for the time spent against the winning defendant, where there is an overlap of proof and the time spent against separate defendants cannot be segregated.” DERFNER & WOLF, *supra*, ¶ 16.02[6], at 16-40 to 16-40.1.

258. The statement in the text is entirely accurate when a party in a consolidated case has only one counsel and that counsel represents only that client. The use of lead and liaison counsel, however, may blur the otherwise clear line between parties and their counsel who are entitled to fees and parties and their counsel who are not so entitled. See *infra* text following note 272 and accompanying notes 273–286.

259. 355 F.2d 936 (Ct. Cl. 1965).

260. *Id.* at 940–42. The statute pursuant to which fees were awarded was § 15 of the Indian Claims Commission Act, 25 U.S.C. § 70n (1976) (expired 1978).

261. 289 U.S. 479 (1933).

"did not merge the separate claims into a new and enlarged cause of action."²⁶² The claims retained their separate characters.²⁶³ By the same token, if some, but fewer than all, consolidated plaintiffs lose on their claims in a manner that renders them liable for attorneys' fees, the courts will impose a corresponding obligation to pay attorneys' fees.

When federal courts hear state law claims, questions of entitlement to attorneys' fees can arise under state law²⁶⁴ that creates issues peculiar to consolidated cases. In *City of Angoon v. Hodel*,²⁶⁵ the district court considered the Sierra Club's entitlement under Alaska law to attorneys' fees incurred in defending against a state law abuse of process claim, filed as a diversity suit, that the trial court had consolidated with a federal question action. The court found that under Alaska Rules of Civil Procedure 82,²⁶⁶

262. *Red Lake & Pembina Bands*, 355 F.2d at 942 n.8.

263. *Accord* *Cohen v. Community College*, 522 F. Supp. 879 (E.D. Pa. 1981). In *Cohen*, where three plaintiffs' claims of race discrimination in employment and two of the plaintiffs' claims of retaliation for their efforts to vindicate their Title VII rights were consolidated for trial, the court denied all attorneys' fees to the plaintiffs with respect to their unsuccessful discrimination claims and awarded fees to the two plaintiffs who successfully sued for retaliation, for the work done with respect to those claims only. The governing statute, the Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5(k) (Supp. V 1993), authorizes counsel fees to a "prevailing party" only. Cf. *Hoppe v. Hullar*, 496 F. Supp. 88 (E.D. Wis. 1980) (holding that hours expended on successful claims by two attorneys would be considered in award of attorneys' fees in consolidated civil rights action, although the formal client of only one had prevailed, where the two attorneys appeared at the court's request, filed appearances with the understanding that their effort would be joint on the common claims, and worked together on those claims).

264. The use of state attorneys' fee statutes in the context of federal litigation of state law claims derives from the Rules of Decision Act (RDA), 28 U.S.C. § 1652 (1988), and the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), interpreting the RDA. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547-51 (1949) (upholding the constitutionality of a state statute that required described shareholders to post security for defendant's reasonable litigation expenses, including attorneys' fees, in a stockholder's derivative action); *Public Serv. Co. v. Continental Casualty Co.*, 26 F.3d 1508, 1520 (10th Cir. 1994) (stating that "[t]he right to recover attorneys' fees is substantive and therefore determined by state law in diversity cases"). See generally DERFNER & WOLF, *supra* note 252, §§ 14.01-.02.

265. No. A83-234, 1988 U.S. Dist. LEXIS 17354 (D. Alaska Aug. 31, 1988).

266. ALASKA R. CIV. P. 82 provides in pertinent part:

Attorney's Fees. (a) Allowance to Prevailing Party as Costs.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law: [schedule omitted]. Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria [sic] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

[T]he 'prevailing party' is the one who has, on balance, prevailed on the principal dispositive issue . . . joined in a case, even though not to the extent of the original contention In complex cases where multiple issues are resolved in favor of different parties, the court has balanced the values of the recoveries and the significance of the issues to determine who prevailed.²⁶⁷

Application of those principles presented the question whether the court should consider the outcomes of all the issues in the consolidated cases collectively in deciding whether the Sierra Club was a prevailing party under Alaska law. Based on federal precedents, the court concluded that

federal policy enunciated by the Supreme Court . . . prohibits courts from providing additional rewards or penalties in the form of attorneys' fees for litigants pressing federal law claims. Moreover, to award, under state law, fees incurred in the prosecution or defense of federal claims for which no independent federal right to attorney's fees exists would directly violate the rule in *F.D. Rich Company [v. United States ex rel. Industrial Lumber Co.]*, 417 U.S. 116 (1974). Merely reducing the award to cover only those fees incurred in the state claims does not cure this defect. A fee award, entitlement to which is based to some extent on a litigant's success or failure on federal claims for which no federal right to fees exists, indirectly provides additional rewards and penalties for litigating those federal claims. Such an application of state law would contravene the federal policies underlying the American Rule.

Accordingly, when a court is determining which party prevailed in a lawsuit for the purposes of awarding attorneys' fees under Alaska R. Civ. P. 82, it must exclude entirely from its analysis any consideration of the outcomes of federal claims for which no independent federal right to attorneys' fees exists.²⁶⁸

267. *City of Angoon*, 1988 U.S. Dist. LEXIS 17354, at *14 (citations omitted).

268. *Id.* at *19-*20. The *Angoon* court may or may not be correct in its extrapolation from *F.D. Rich Co.* In *F.D. Rich*, the Court held it to be error to construe a federal statute, the Miller Act, to permit an award of attorneys' fees predicated on the public policy of a state. *F.D. Rich Co. v. United States ex. rel. Industrial Lumber*, 417 U.S. 116, 126-31 (1974). Some of the reasons and policies underlying that decision (including the absence of congressional intent to incorporate state law, the utility of a uniform national rule, the difficulty of divining state policy, and the inapplicability of the policies that supported existing judicially created exceptions to the American Rule on attorneys' fees) are not relevant when the question is: "What results should be taken into account in determining attorneys' fees under a state fee-shifting statute?"

Consequently, the court had to ignore the outcomes of the federal claims asserted in the consolidated cases in its analysis of the Sierra Club's entitlement to attorneys' fees under Alaska law.²⁶⁹ It should be noted that, in so concluding, the court treated the issues precisely as it would have done had the federal and state law issues been parts of a single civil action that was not the product of consolidation.

As an independently sufficient basis for rejecting the arguments against awarding the Sierra Club any attorneys' fees, the court invoked the principles that consolidated actions do not lose their separate identities, merge the suits, or change the rights of the parties. On this ground as well, it concluded that the outcomes of the other actions had no bearing on the Sierra Club's entitlement to an award of fees for successfully defending against the state law claim that had originated as a separate suit and had been reasserted in an amended counterclaim after consolidation (the court having ordered the parties to file amended consolidated complaints, answers, and counterclaims).²⁷⁰ In so reasoning, the court treated the consolidation as composed of separate civil actions for purposes of determining whether a litigant is a "prevailing party" under Alaska's attorneys' fee statute. As previously noted, however, the outcome was the same as that the court reached when it considered the consolidation a single civil action.

269. *Accord* United States *ex rel.* Garrett v. Midwest Constr. Co., 619 F.2d 349, 352-53 (5th Cir. 1980) (where a Miller Act, 40 U.S.C. §§ 270a-d (1988 & Supp. V 1993), suit and a diversity suit were consolidated, holding the state attorneys' fee provision inapplicable to the former but applicable to the latter). When plaintiffs have brought pendent state law claims along with federal questions, the courts sometimes have held that state fee provisions authorized attorneys' fees for time spent on both the state and the federal claims, and that federal law did not limit such recoveries. *See, e.g.,* Owen v. Modern Diversified Indus., Inc., 643 F.2d 441, 444-45 (6th Cir. 1981) (under state law, awarding fees to prevailing defendant to cover both the federal and the state aspects of a suit); Young v. Taylor, 466 F.2d 1329, 1336-38 (10th Cir. 1972) (approving attorneys' fee award, grounded in state law, which jury had not been instructed to limit to common law fraud claim, where plaintiff prevailed on both it and federal securities fraud claims). If the plaintiffs' success on the federal claims obviated the need to reach fee-generating state law claims, the court would have to determine how state law deals with that complication. *See supra* note 251. Such plaintiffs might be considered prevailing parties under state law. *See generally* DERFNER & WOLF, *supra* note 252, at ch. 14 (discussing the role of state law in providing a basis for awarding attorneys' fees in federal court).

When a party has prevailed on a federal claim that authorizes attorneys' fees to the prevailing party, the courts generally do not consider the outcome of state claims in determining whether the party was a prevailing party within the meaning of the fee authorization. Rather, the question is: Under what circumstances, if any, is the fee applicant entitled to recover legal fees for time spent on the non-fee portion of the litigation? For case law addressing this question, *see* DERFNER & WOLF, *supra* note 252, ¶ 12.02[2][a].

270. *City of Angoon*, 1988 U.S. Dist. LEXIS 17354, at *3, *12, *22-*23 & n.5.

Once courts have decided entitlement issues from the perspective of the parties, they also have to decide the amount of attorneys' fees to award and must apportion the fees among those entitled to receive them.²⁷¹ On occasion, the consolidation of cases and whether it created a single civil action have influenced the amount to be awarded and the correlative obligation to pay.²⁷² More commonly, consolidation has created both entitlement and apportionment issues from the perspective of the attorneys. For reasons elaborated below, the entitlements of attorneys may differ from the entitlements of parties when attorneys' fees are awarded under the common fund-common benefit doctrine, rather than pursuant to a statute that shifts to the losing party the obligation to pay fees.

Although the problem of allocating fees among attorneys can arise whenever multiple attorneys represent a party or co-parties in litigation, both entitlement issues and apportionment questions take on a unique aspect in cases (often consolidated cases) in which the court appoints, or the parties' attorneys select, some attorneys as lead or liaison counsel. The latter, in turn, may parcel out responsibilities to other attorneys who have clients among the parties to the consolidated cases. In those circumstances, attorneys perform legal services for the benefit of parties who did not retain them as their lawyers. Attorneys also may expend greater time and effort than would be reasonable if their endeavors were undertaken exclusively on

271. Similarly, where losing parties have an obligation to pay fees, courts have to apportion the obligation among the obligors. See generally DERFNER & WOLF, *supra* note 252, ¶¶ 17.01-.03. The most common approaches to apportionment of the obligation are based upon joint and several liability, a percentage division predicated on such matters as fault, time spent, or other factors, defendants' respective degrees of culpability or their relative liabilities on the merits, and the time spent litigating against each party liable for fees. *Id.* ¶ 17.03, at 17-13 to 17-17. Prevailing defendants typically are not obliged to share the costs of litigation, *id.* ¶ 17.03, at 17-10, but courts may order losing defendants to pay prevailing parties for the time the prevailing parties spent on claims against a prevailing defendant which contributed to success against the losing defendants. *Id.* ¶ 17-10 n.5.1 (citing cases).

272. See, e.g., *Roden v. Empire Printing Co.*, 135 F. Supp. 665, 667 (D. Alaska 1955) (deciding the amount of fees to award under local district court rules), *aff'd on other grounds*, 247 F.2d 8 (9th Cir. 1957). The court regarded an order of consolidation and joint trial pursuant to Federal Rule of Civil Procedure 42 as having merged the consolidated suits into one action. While noting that to allow attorneys' fees in each antecedent case would provide considerably greater fees, the court concluded that, on its view of the consolidation, under its local rule, UNIF. R. DIST. CT. ALASKA 45, 14 Alaska LVII-LVIII (1954), attorneys' fees were properly allowed on the basis of one action only. Nonetheless, because the resulting amount seemed insufficient in view of the time and work that plaintiff's attorney had invested and because the court had discretion to depart from the schedule set by the local rule, the court awarded an intermediate amount, as just. Rule 45 provided, "Attorney's Fees. Unless the court in its discretion otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the prevailing party as a part of the costs of action allowed by law." The fee schedule followed. It made no reference to consolidated cases.

behalf of the clients who did retain them. The time and effort that the various contributing attorneys expend may not be practicably divisible as between parties who prevail and parties who, for some reason, fail to prevail in the litigation.²⁷³ Whether the award of fees is governed by a statute that shifts fees to losing parties or is authorized by common fund-common benefit theory, all of these peculiarities complicate the task of determining which lawyers are entitled to attorneys' fees, for what undertakings, and in what amounts. Consequently, these peculiarities also complicate the tasks of determining which *parties*, in consolidated cases characterized by the use of lead and liaison counsel, are entitled to have their lawyers compensated by the losing litigants or out of recovered funds, for what undertakings, and in what amounts.

The peculiarities noted above raise such questions as whether, and by what rationale, a lead counsel whose own client²⁷⁴ loses is entitled to attorneys' fees; whether an attorney whose labor was reasonable in proportion to the stakes of all the parties in the consolidation whom his efforts were calculated to benefit, but disproportionate to the stake of only his own clients, may recover undiminished attorney's fees; and whether a counsel who did nothing, but whose client prevailed as a result of the efforts of lead counsel, is entitled to attorney's fees, and if so, how such fees are to be calculated. It is noteworthy that these questions are presented in a context that differs from that of the class action. When a court has certified a class under Rule 23 of the Federal Rules of Civil Procedure, the lead and liaison counsel that it appoints or approves are counsel for the class; the class members are their clients²⁷⁵ in a way that has no parallel in consolidated actions, which technically speaking, are not representative actions.²⁷⁶ Thus, the time and effort expended by lead and liaison counsel in class actions *are* expended on behalf of the parties whom they formally represent in a way that has no analogue in consolidated litigation. Nonetheless, courts have *not* distinguished between class actions and consolidated actions in addressing these questions.²⁷⁷ They have, however, distinguished between statutory fee shifting contexts and common fund-common benefit situations.

273. See *supra* note 257.

274. By "own client," I mean the client who formally retained this lawyer.

275. Class members may retain additional counsel, as well, however.

276. See generally Silver, *supra* note 25, at 499.

277. At least one commentator has distinguished between them, however. See *id.* at 505-13 (discussing how the differences in structure, between class actions and consolidations, have different implications for lawyers' ability to efficiently allocate fees among themselves).

Thus, in common fund-common benefit cases, where attorneys themselves may seek compensation,²⁷⁸ one would expect to find that courts have awarded fees to lead counsel whose own client lost when others among the consolidated parties on the same side of the litigation prevailed through the efforts of lead counsel. By contrast, "when a statute authorizes fees to a prevailing party, plaintiffs and not their attorneys own the fee cause of action."²⁷⁹ Consequently, when court ordered fees are available only through a fee shifting statute, a prevailing party (who may be someone other than lead counsel's "own client") would have to seek fees with which to pay lead counsel. In both common fund-common benefit and statutory fee shifting situations, "courts have not required that the time spent by lead counsel be connected only with the representation of one particular client."²⁸⁰ Finally, courts have denied fees to counsel whose clients prevailed but who did not contribute to that success.²⁸¹ Courts may award

278. See, e.g., *Florin v. Nationsbank of Ga.*, 34 F.3d 560, 563 (7th Cir. 1994); *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

279. *CONTE*, *supra* note 252, § 3.08, at 154; see *Evans v. Jeff D.*, 475 U.S. 717, 730, 732 n.19 (1986) (holding that Congress bestowed on the prevailing party, rather than on counsel, a statutory entitlement to eligibility for attorney's fees; citing cases); *United States v. McPeck*, 910 F.2d 509, 513 (8th Cir. 1990) (same, in the context of bankruptcy); *Soliman v. Ebasco Servs., Inc.*, 822 F.2d 320, 322-23 (2d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (same, in the context of Title VII).

280. *DERFNER & WOLF*, *supra* note 252, ¶ 17.02, at 17-8; see, e.g., *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977) (upholding requirement, in nonclass consolidated cases, that if, after lead counsel was appointed, any plaintiff individually settled a claim arising from the airplane crash that was the subject of the action, s/he contribute five percent of the settlement as fees for the services of lead counsel; denying fee award as to people not benefitted by the efforts of lead counsel); *accord In re Air Crash Disaster at Fla. Everglades*, on Dec. 29, 1972, 549 F.2d 1006, 1016-20 (5th Cir. 1977). See generally *DERFNER & WOLF*, *supra* note 252, ¶ 17.03, at 17-18.

281. See *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 671 (2d Cir. 1988) (denying fees to intervenors who did nothing to create the fund); cf. *Class Plaintiffs v. Jaffe & Schlesinger*, 19 F.3d 1306 (9th Cir. 1994). In *Jaffe & Schlesinger*, counsel for plaintiffs in state court litigation that paralleled multidistrict federal litigation sought attorneys' fees and expenses from the settlement fund created in the federal litigation, where the settlement resolved the state court litigation as well as the federal. Although the district court conceded that the efforts of these counsel may have benefitted the federal class plaintiffs, it concluded that the two litigations were not sufficiently related to justify an award of fees and expenses. It found "no authority which mandates an award of fees to attorneys not formally representing the class, whose activities in representing others incidentally benefit the class." *Id.* at 1309. The rationale for denying attorneys' fees to attorneys who did not contribute to the success is evident in common fund-common benefit cases. See *infra* text accompanying notes 286-287. In statutory fee shifting situations in which a party prevails through the efforts of lead counsel rather than through the efforts of his retained counsel, the latter's inability to recover fees may be a function of the courts' adherence to the "lodestar" approach to calculating fees. See *City of Burlington v. Dague*, 112 S. Ct. 2638, 2641 (1992) ("The 'lodestar' figure has . . . become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee . . .").

additional fees to lead and liaison counsel for their efforts in managing the lawsuit.²⁸² At the same time, courts may feel obliged to alter the fee arrangements that parties made with the non-lead lawyers whom they formally retained.²⁸³

While, generally speaking, these results fairly reflect the functioning of counsel in consolidated litigation, they are somewhat difficult to square with the formally non-representational nature of consolidated, non-class litigation, especially when the fee awards are based on statutory authorizations. The common fund-common benefit doctrines are not predicated upon a formal attorney-client relationship. The basic theory is that "courts can impose liability for court-appointed counsel's fees on all plaintiffs benefitting from their services."²⁸⁴ In sweeping dicta, Justice Frankfurter once wrote,

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit [for example]—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.²⁸⁵

Consistent with this broad conceptualization, the common fund-common benefit doctrine provides a basis for awarding counsel fees not only out of the proceeds of class action litigation, but also out of the pro-

282. See, e.g., *In re Swine Flu Immunization Prods. Liab. Litig.*, 89 F.R.D. 695, 706, 708–09 (D.D.C. 1981) (adding to fee award for daily administration of the litigation).

283. See, e.g., *Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) (remanding for consideration of whether contingent fee agreements of nonlead attorneys remained reasonable in light of decrease in responsibilities following court appointment of and award of fees to lead and liaison counsel).

284. *Id.* at 747. For a history and critique of the common fund mechanism, see generally John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1609, 1653 (1974) (stating that the fund concept recaptures unjust enrichment, but also has the effect of magnifying fees through a profit-sharing scheme; and one of its purposes is to augment the income of lawyers). The frequent absence and infeasibility of contractual fee agreements between consolidated parties and the lead and liaison counsel who are appointed to help represent them are among the reasons that courts determine the fees of such counsel.

285. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); see also *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (endorsing application of the common fund doctrine in class actions, saying "[u]nless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. The judgment . . . rectifies this inequity by requiring every member of the class to share attorney's fees to the same extent that he can share the recovery.").

ceeds of consolidated cases in which lead counsel has been appointed.²⁸⁶ In the respects described above, consolidation alters the dimensions of the rights of parties to have their lawyers compensated by losing litigants and of the right of lawyers to be compensated out of recovered funds.²⁸⁷

When the issue is whether a case is ripe for appellate review of the district judge's decision on an application for attorneys' fees, whether the court treats a consolidation as a single civil action or as an aggregate of separate actions may be determinative. Appellate courts normally will not review adverse decisions on fee petitions when the merits of the underlying action remain pending in the district court,²⁸⁸ because "questions about who has prevailed cannot intelligently be resolved in advance of the merits. Decisions about fees are separate 'final decisions' under [28 U.S.C.] § 1291 only after there is a final judgment on the merits that would be 'final' but for the matter of fees."²⁸⁹ Given these principles, the question recurs whether a final appealable judgment exists when one or more consolidated

286. See, e.g., cases cited *supra* note 280. While, in the past, some commentators believed that a potential beneficiary of legal services prompted by another might escape the workings of the common fund doctrine if he hired and paid his own attorney to actively take part in litigation, as the parties to consolidated cases typically do, see Dawson, *supra* note 284, at 1647, as we have seen, the courts instead have undertaken to apportion fees according to the relative contributions of counsel. *Id.* at 1649; see *supra* text accompanying notes 280-283.

287. The amount of attorneys' fees may be very great in consolidated cases, particularly where numerous cases have been consolidated. As a result, the principle that unreasonable fees violate attorneys' ethical obligations, see Weinstein, *supra* note 19, at 527, is particularly, although not uniquely, salient in these cases. I subscribe to the view, previously advocated by others, that, where a large number of cases have been consolidated, our system should require judicial approval of fees to prevent overreaching. See *id.* at 529; ABA COMM'N ON MASS TORTS, REPORT TO THE HOUSE OF DELEGATES 9 (1989) (in Recommendations 10, 11, and 12, urging development of guidelines for determination of reasonable fees and expenses for attorneys in mass tort litigation and providing that "[w]henver judgment is entered or a settlement approved in a consolidated mass tort litigation, the court should provide by order entered after hearing that maximum fee(s) not plainly excessive in light of published guidelines, prevailing rates or the circumstances of the case," that the court may require fee arrangements to be submitted *in camera* and should disallow plainly excessive fees); *id.* at 71-79. But many questions remain. See, e.g., Weinstein, *supra* note 19, at 528 ("What is the duty of the plaintiffs' attorney to minimize fees and allocate them when the overall fee is not commensurate with the work done for each individual client?"); *id.* at 531 (When a committee supervises the litigation, how should fees be divided with outlying attorneys who have contact with clients as well as with the committee?).

288. See *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339, 341, 344 (5th Cir. 1989), *cert. denied*, 114 S. Ct. 548 (1993); *Rosenfeld v. United States*, 859 F.2d 717, 720 (9th Cir. 1988); *Sandwiches, Inc., v. Wendy's Int'l, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987); *Palmer v. City of Chicago*, 806 F.2d 1316, 1319-20 (7th Cir. 1986) (described in *Sandwiches*, 822 F.2d at 711, as holding "interlocutory appeal possible on award of 'interim' fees only if there is a substantial chance that a party prevailing on appeal would be unable to retrieve the award"), *cert. denied*, 481 U.S. 1049 (1987).

289. *Sandwiches*, 822 F.2d at 711.

cases have been completely resolved but others among the cases in the consolidation remain pending in the district court. As Part I of this Article reflected, the answer to this question varies among the federal courts of appeals.²⁹⁰ Some hold that an immediately appealable final judgment exists under the circumstances described above. Others hold, to the contrary, that those who lost in the trial court must await the entry of judgment on all the claims in the consolidated actions before they may appeal as of right. They may appeal sooner if but only if the trial court expressly directs entry of a final judgment and expressly determines that there is no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, or if some other exception to the "final judgment rule" applies. Often, which approach a court of appeals takes varies depending on a variety of circumstances.

The upshot of this state of the law is that litigants who prevail on the merits in the trial court will have to postpone the appeal of an adverse decision on attorneys' fees²⁹¹ until the entry of judgment in all the cases with which the courts have consolidated their litigation *when* in a jurisdiction that treats a consolidation as an entity for appeals purposes and *if* the district court will not make a Rule 54(b) certification. Of course, litigants will not be subject to such delay in a jurisdiction that treats the judgment in a single component action of a consolidation as an immediately appealable final judgment. In light of the reasons for treating consolidations as a unit for appeals purposes, such delay is acceptable *in the absence of conditions that justify Rule 54(b) certification*.²⁹² Although this course entails some curtailment of the traditional right to immediately appeal, the alternative imposes greater costs and is less consistent with sound judicial administration.²⁹³ The interests of the litigants are protected in that, in determining whether to make a Rule 54(b) certification, the court should consider any prejudice that either of the would-be appellants (the loser on the merits or a dissatisfied fee petitioner) would suffer by virtue of delaying the appeal.

When the task is to identify "prevailing parties" entitled to the taxation of costs against defeated opponents, whether case consolidations are regarded as single civil actions or as a number of civil actions typically does not affect the outcome. Thus, the fact that certain plaintiffs in consolidat-

290. Steinman, *supra* note 1, at 794-807, explored this question at length.

291. Indeed, they may have to postpone filing their petition for attorneys' fees until the entry of judgment in all the cases with which the courts consolidated theirs, under the circumstances described in the text, although this would seem unnecessary if the outcome of those other decisions could have no effect on the merits and attorneys' fees decisions in their case.

292. See Steinman, *supra* note 1, at 794-807.

293. See *id.*

ed actions succeed in establishing their claims does not render all plaintiffs in the consolidated cases "prevailing parties" for purposes of the taxation of costs; indeed, courts properly assess costs against unsuccessful plaintiffs notwithstanding that their claims were consolidated with those of other plaintiffs who prevailed.²⁹⁴ Courts handle multiple plaintiffs who joined in a single action in precisely the same way.²⁹⁵

When courts tax certain recoverable costs to unsuccessful parties, whether case consolidations are regarded as single civil actions or as a number of civil actions may affect the amounts awarded, however. Under the Federal Rules of Civil Procedure,

[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.²⁹⁶

294. *Modick v. Carvel Stores*, 209 F. Supp. 361, 363 (S.D.N.Y. 1962) (assessing costs against unsuccessful plaintiffs whose cases had been consolidated for trial with cases in which other plaintiffs prevailed).

295. *Id.*

296. FED. R. CIV. P. 54(d)(1). 28 U.S.C. § 1920 (1988) provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1923 (1988) sets forth the specific dollar amounts of the docket fees for various categories of cases and particular filings, and maximum costs for printing the briefs in admiralty appeals. Other federal statutes, Federal Rules of Civil Procedure, and local federal rules also may bear upon the costs that may be awarded. See, e.g., 28 U.S.C. § 1821 (1988 & Supp. V 1993) (regarding per diem fees, mileage, travel, and subsistence allowances); 35 U.S.C. § 284 (1988) (concerning the award of costs in cases arising under the Patent Act); 48 U.S.C. § 25 (1958) (concerning Attorney General's prescription of costs for legal services performed in the territory of Alaska); FED. R. CIV. P. 68 (providing that if the judgment obtained is not more favorable than a previous offer of judgment, the offeree must pay the costs incurred after the making of the offer); S.D.N.Y. CIV. R. 11(a) (providing that within 30 days after the disposition of an appeal, the party recovering costs shall file a request to tax costs).

When cases have been consolidated, courts generally have awarded as costs the cumulative docket fees paid in the several cases that were subsequently consolidated.²⁹⁷ One might view courts that do so as treating the component parts as separate actions, but such handling merely recognizes the docket fees that courts actually charged. Plaintiffs necessarily incurred multiple docket fees where they initially brought distinct cases.

More significant, from my perspective, are the cases that allow witness fees to persons who are parties to one or more of the consolidated cases but testify only in actions, among the consolidated cases, in which they are not parties.²⁹⁸ The general rule is that "witnesses who are real parties in interest are not entitled to reimbursement or allowance for their testimony."²⁹⁹ Under my view that cases consolidated for trial or more broadly should be treated as a single civil action, persons who are parties to any of the consolidated cases should not be paid witness fees for testifying in any of them, absent a severance for trial and corresponding multiple appearances as a witness. The contrary rule seems to invite underhanded conduct: parties ostensibly testifying only "in" actions in which they are not parties, although the trier of fact, particularly a jury, is likely to take their testimony into account in whatever contexts it is relevant, including the consolidated case(s) in which the testifying persons are parties. The more sensible approach similarly is to allow only one witness fee when a "pure" non-party witness testifies in cases consolidated for trial.³⁰⁰

297. See, e.g., *Lockett v. Hellenic Sea Transps., Ltd.*, 60 F.R.D. 469, 474 (E.D. Pa. 1973) (where consolidated cases had proceeded independently for over two years and defendant had been required to pursue discovery independently, holding defendant entitled to a separate docket fee in each case); *Modick*, 209 F. Supp. at 363-64 (S.D.N.Y. 1962) (awarding aggregate docket fees where cases had been consolidated for trial, a relatively short time before trial). I do not understand why the courts attach any importance to when, in the life span of the cases, the consolidation occurred, but they sometimes do so.

298. See *Modick*, 209 F. Supp. at 363-65 (allowing witness fees, in the circumstances described in the text, where cases had been consolidated for trial, a relatively short time before trial).

299. *Id.* at 365 (citing 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 54.77(5) (2d ed. 1988)); see also *Fahey v. Carty*, 102 F.R.D. 751, 754 (D.N.J. 1983) (disallowing as costs expenses of a personal injury plaintiff for travel from Florida to New Jersey forum).

300. *Accord Reynolds Metals Co. v. Yturvide*, 258 F.2d 321, 335 (9th Cir.), cert. denied, 358 U.S. 840 (1958); *Copeman Lab. Co. v. Norge*, 89 F. Supp. 161, 163 (E.D. Mich. 1950) (stating that to double the witness fee allowance—attendance fees, mileage, and subsistence—for a consolidated trial would frustrate the purpose of Federal Rule of Civil Procedure 42 to avoid unnecessary costs). The statute prescribing witness fees at the time these cases were tried was 28 U.S.C. § 600c (1948), quoted in *Norge*. *Id.* at 162-63. The fact that the parties in the consolidated cases were not identical, although they overlapped, did not remove the cases from the ambit of the statutory language that, "[w]hen a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance." *Id.* at 163; see also *Brown v. Kinnicutt*, 2 F.2d 263, 264 (S.D.N.Y. 1924). In *Brown*, where plaintiffs, each of whom had a separate cause of action for

Overall, the federal law governing the award of attorneys' fees and the taxation of costs generally is such that whether courts regard case consolidations as single civil actions or as a number of civil actions will not affect which parties will be awarded attorneys' fees and costs, and for what successes. On the other hand, the availability of witness fees may depend on whether the court "sees" one or many civil actions in a consolidation, and state attorneys' fee law may create entitlement issues whose resolution is affected by consolidation.

Moreover, whether state or federal attorneys' fee law is applicable, which attorneys are active in the litigation and consequently earn fees is affected by consolidation, although it is not affected by how many civil actions the court counts. Certainly, the stakes for lawyers may be dramatically amplified by consolidation. The use of lead and liaison counsel and the relative submersion of other counsel retained by parties, which is characteristic of at least large consolidations, substantially affect the allocation of earnings among lawyers with clients in the consolidation. Consolidation thus creates both entitlement and apportionment issues from the perspective of attorneys and, particularly when fees are awarded pursuant to a fee-shifting statute, creates correlative issues for the parties. While the courts' approach to fee allocation, in both statutory and common fund situations, has fairly reflected the functioning of counsel in consolidated litigation, in the context of fees awarded under statutes especially, that approach is difficult to square with the formally nonrepresentational nature of consolidated litigation. In general, the dimensions of the statutory rights of parties to have their lawyers compensated by losing litigants, and of the common-law rights of parties to have their lawyers compensated out of recovered funds, are altered by consolidation.

The amounts of some categories of taxable costs also may be affected by consolidation. And the timing of attorneys' fees awards and their appeal are affected by whether courts regard case consolidations as single civil actions or as a number of civil actions. Thus, it cannot be denied that

deceit in the sale of shares of stock, had their claims combined under then-section 209 of the New York Civil Practice Act and, had each sued alone, the cases might have been consolidated under Rev. Stat. § 921 (Comp. Stat. § 1547), "the plaintiffs could not recover separate bills of costs, [and consequently] neither should each be liable severally" if defeated. The court therefore denied a motion to require the plaintiffs to give separate security for costs. It found, in various enactments, congressional intent to deny a suitor more than single costs whenever it was possible for him to have consolidated his actions. For another case bearing on witness fees in consolidated cases, see *United States v. Tippet*, 975 F.2d 713 (10th Cir. 1992), discussed in Steinman, *supra* note 1, at 794 n.250.

consolidation alters the procedural rights of litigants with respect to the award of attorneys' fees and costs.

CONCLUSION

This Article has demonstrated that consolidation changes the procedural rights of litigants, notwithstanding shibboleths to the contrary. From pleadings to peremptory challenges, discovery to dismissal, recusal to res judicata, the attorney-client relationship and attorneys' fees to appeals, consolidation of cases alters procedural rights. With information as to how the system works, participants should be better able to protect their interests.

This Article also has sought to identify the contexts in which it matters whether courts regard consolidations as single civil actions or as aggregates of several civil actions. Whenever it matters, the Article considered whether a better procedural system would result from a shift in the paradigm, from that in which each component is deemed to have retained a separate identity, to one in which consolidating cases for all purposes or for trial would create a single, all-encompassing civil action. Examining each instance where that characterization matters, including the posture of claims, discovery, voluntary dismissal by stipulation, the scope of jury demands, consents to trial by magistrate judge, and the number of peremptory challenges to which litigants are entitled, it concluded that the judicial system would work more fairly and efficiently if we were to treat consolidations as single civil actions.

Thus, considering a consolidation of cases for all purposes or for trial to be a single, all-encompassing civil action would facilitate the assertion of claims among parties from different components and enable the courts to hear claims under their supplemental jurisdiction that the courts otherwise might be unable to entertain. Without sacrificing fairness, this view would legitimate current practices, prevent surprise, and promote efficiency in the trial court, by facilitating the cross-component use of the discovery devices and sanctions that are available only against parties. It also would conserve appellate resources when persons who are parties to some, but fewer than all, of a set of consolidated cases appeal discovery rulings.

Considering a consolidation for all purposes or for trial to be a single, all-encompassing civil action also would ensure that all interested persons must stipulate to a voluntary dismissal pursuant to Rule 41(a)(ii). In light of the likely authority of lead counsel to stipulate on behalf of all co-parties in a massive consolidation, and of the courts' authority to dismiss at a plain-

tiff's request when all parties will not stipulate, this construction of Rule 41(a)(ii) should be neither too burdensome nor too harsh.

Treating a consolidation for all purposes or for trial to be a single, all-encompassing civil action also could extend the time in which parties must file jury demands. Because parties' evaluations of the desirability of a jury may change with the contours of the litigation, the extension of time proposed here would be reasonable and appropriate. Treating a consolidation in this manner also would expand the scope of the issues encompassed by a general jury demand and the circle of persons who could serve a jury demand in response to an issue-limited jury demand or whose consent would be a prerequisite to the withdrawal of a jury demand. I have proposed that parties to other components than that in which a demand was made should be able to rely on a general jury demand, but only insofar as the components share common fact issues; similarly, that parties to other components should be able to make a timely jury demand in response to an issue-limited jury demand, but only if the issues for which a jury initially was demanded include issues to which the new jury-demanders are connected; and that, without regard to the antecedent action to which they are parties, the parties whose consent must be obtained to permit a jury demand to be withdrawn should be all those connected to the issues that, but for the proposed withdrawal, would be heard by a jury. Considering a consolidation for all purposes or for trial to be a single, all-encompassing civil action also would enable courts to intelligently exercise their discretion to order a jury trial as to issues, in other components, that either carried no right to a jury trial or as to which the parties waived their right. It also would imply that all the parties to a consolidation must consent to having a magistrate judge conduct the proceedings. All of these proposals would create a desirable system for component cases that will be tried together. Indeed, they would create a far more desirable system than that which flows from treating the components of a consolidation as separate actions.

Treating a consolidation for all purposes or for trial to be a single, all-encompassing civil action would make similar sense in the context of recusal decisions. In fact, because multicase discovery often has effects that continue through trial, multicase pretrial also may expand the scope of the proceedings in which judges' impartiality reasonably may be questioned and in which judges may be required to disqualify themselves. The treatment of consolidations advocated here also would reduce the number of peremptory challenges that civil litigants can exercise as a matter of right, while preserving the courts' discretion to increase the number of such challenges, wherever appropriate.

Because of the many advantages of treating a consolidation for all purposes or for trial as a single, all-encompassing civil action, I urge courts, law reform groups, and legislators to move the law in that direction. At the same time, it is my hope that through better understanding of the effects that consolidation already has on the procedural rights of litigants, parties will be better able to protect their interests and courts will take even greater care to tailor their orders combining lawsuits to fit the needs of particular cases.